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VIA ELECTRONIC FILING

Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551

Subject: Joint Comments of NAAIO and ATM Council (“ATM Commenters”)
Regulation II: Docket No. R-1404
RIN No. 7100-AD63

Dear Ms. Johnson:

The National Association of ATM ISOs and Operators (“NAAIO”), and the ATM Council of the Alliance for Specialized Communications Providers (the “ATM Council”), respectfully file these joint comments in response to the Board of Governors’ of the Federal Reserve System (the “Board”) Notice of Proposed Rulemaking and request for comments issued in this docket on December 16, 2010 (“NPRM”).¹

I. INTRODUCTION AND SUMMARY OF POSITION

NAAIO and the ATM Council² appreciate the opportunity to comment to the Board on its implementation of the landmark Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank” or the “Act”) which amends the Electronic Fund Transfer Act (“EFTA”) (15 U.S.C. § 1693 et seq.) by adding a new Section 920 regarding interchange transaction fees and rules for debit card transactions.

¹ Insofar as possible with a diverse membership, these comments represent a broad consensus, but not necessarily unanimity. Some members may file individual comments with complementary perspectives.

² Hereafter, NAAIO and the ATM Council will be referred to jointly as the “ATM Commenters.”

A. Summary of Comments

The ATM Commenters first provide background to assist the Board in understanding their segment of the ATM industry and next show how the regulations adopted in this docket can best protect the public interest regarding non-bank ATM transactions, consistent with the letter and spirit of Section 920. Specifically, ATM Commenters:

- Support the Board's conclusion that Section 920's provisions on interchange fees **do not apply** to ATM transactions;
- Support adoption **of Alternative B** to implement Section 920's prohibition on single network restrictions for each and every transaction using a debit card;
- Recommend the Board recognize that the Act's prohibition against single network restrictions **does apply** to ATM transactions and networks;
- Observe that application of the foregoing requirements to both three and four-party networks is required under the applicable provisions of Section 920;
- Suggest possible revisions to proposed definitions for clarification and greater consistency with the Act; and
- Urge the Board not to delay implementation of Section 920(b) to 2013.

II. BACKGROUND OF THE INDUSTRY SEGMENT THAT ATM COMMENTERS REPRESENT

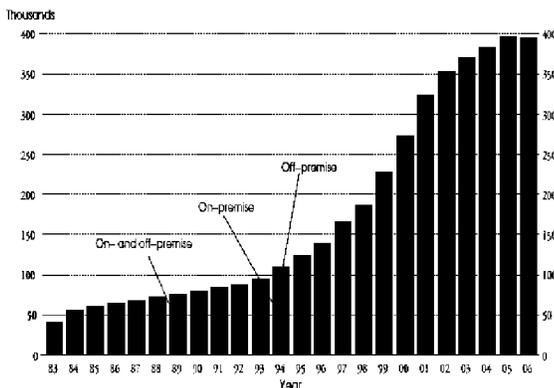
A. NAAIO and the ATM Council Represent Non-Bank ATM Deployers

The ATM Commenters are both national not-for-profit trade associations that represent the interests of solely non-bank ATM independent sales organizations ("ISOs") and ATM providers across the U.S. The ATM Commenters' members range from companies with tens of thousands of ATMs in their portfolios to those with fewer than ten machines. Their member companies are small and medium-sized businesses that operate independent of the banking industry.

Based upon industry estimates, this non-bank or “independent” segment of the ATM business in total accounts for about 200,000 ATMs in service today throughout the U.S., or approximately one-half of the about 400,000 total ATMs now deployed across the nation. Between them, the ATM Commenters represent over 75,000 of the non-bank ATMs in the U.S., processing over 200 million transactions annually.

B. Background And Public Interest Benefits Of The Non-Bank ATM Industry Sector

The banking industry pioneered the deployment of ATMs in the U.S., but it is the independent ATM provider segment of the industry that has placed them within reach of nearly everyone. The first ATM was installed in the U.S. in 1969. For more than two decades, only banks were permitted to deploy ATMs. As the chart below shows, growth in the number of ATMs for the next 20 years or so was steady, but slow. In the mid-1990s, regulations and bank networks began to permit non-banks to place ATM machines. The growth of ATMs then became exponential and did not start to level off until the past several years.



Source: EFT Network Data Book (various years).

The tremendous growth in the nation’s ATM base over the last decade and a half reflects the fact that ATMs were and are of great benefit to the public. Americans today continue to depend a great deal on cash in their daily lives—low income Americans even more so. The ATM enabled the public to withdraw cash without having to wait in long lines inside the bank building. With the advent of widespread ATM deployment, Bank customers were able to access their cash before and after regular bank hours. Perhaps even more importantly, travelers could now

access their cash anywhere in America—no turn down of “out of town” checks and no need to buy travelers’ checks—with “24/7/365” availability to boot.

Before the advent of independent ATM deployers, bank card holders still typically had to locate/travel to a bank to use an ATM. Banks placed a few “off-premise” ATMs at high traffic locations, such as airports and some large grocery store chains. But as the chart above shows, the explosion of off-premise ATMs was driven by non-bank deployers, in part because they use smaller, less expensive machines and were able to utilize much lower cost structures than the banks.

In addition to the relevant regulatory and financial institution changes mentioned above, the key to creation and growth of the non-bank ATM industry in the U.S. was the establishment of revenue streams to incent independent ATM operators to make the necessary investment and ongoing operational commitment to deploy ATMs. Banks are able to support their ATMs with fees tied to ATM use. However, in most cases, banks do not charge a fee for their customers to use that banks’ own ATMs. Most banks can and do charge a fee for customers of other banks to use their ATMs.³ There are several reasons that banks are in a position to waive fees for their own customers. First, banks use their ATM networks to attract customers. It is part of the suite of “services” that banks market to depositors. Second, by having ATMs on the outside wall of the bank or in the bank lobby, many customers will avoid using a teller to transact their banking business, which helps reduce the bank’s operating costs. At bottom, the banks are able to recover their ATM costs through the interest income they earn on deposits and through fees they charge their customers for other services.

In contrast to banks, independent ATM providers have only one line of business and maintain no deposits. Their only source of revenue to cover the costs of maintaining an ATM are ATM transaction-based fees. At the advent of independent ATMs, the only permitted fee was the interchange fee.⁴ This proved insufficient to support deployment of ATMs in all but the highest traffic/volume locations. In light of this, independent ATMs were soon allowed to also charge a “convenience fee” commonly referred to as a “surcharge.” Once this dual fee structure became commonplace, ATM availability for consumers shot up significantly.

³ Indeed, the average bank ATM fee is higher than the average independent ATM fee.

⁴ As noted in the NPRM, the interchange fee in an ATM transaction is the reverse of merchant POS transaction. The network (and indirectly the cardholder’s issuing bank) pay a fee to the ATM ISO or operator for the transaction.

Although many consumers resist paying even a modest convenience fee, the fact that the independent ATM industry attracts hundreds of millions of transactions annually is irrefutable evidence of public demand for the service, notwithstanding such a fee. Put in the perspective of the alternative of driving across town to the bank branch, the ATM surcharge truly is a “convenience” fee. And, for low income citizens, the disabled, or anyone who might have to use a taxi or public transit to go to the bank, an ATM at the corner convenience store, gas station, or restaurant could mean the practical difference between being able to gain access to the banking system⁵ or not. As such, widespread ATM deployment fostered by the independent provider segment of the industry provides an important if not invaluable public service.

C. Banks Are Not At All Representative Of The Interests Of Independent ATM Deployers

To date, a number of banks and credit unions have already filed comments in this proceeding. Although nearly all banks and credit unions deploy ATMs, it is critically important that the Board understand how very divergent the banks’ interests and business models are from those of the ATM Commenters, representing independent ATM deployers. It was in large part the excesses of the banks, and the networks and credit card brands that the banks spawned, which led Congress to adopt Dodd-Frank and Section 920. In contrast, the ATM Commenters’ members were victims of some of those same or similar excesses.⁶

The harms from anti-competitive actions by the networks to the non-bank ATM industry have also caused consequential harm to consumers. Thus, in reviewing the sometimes competing arguments of the banks and the ATM Commenters, the Board should be cognizant that banks and networks continue to have—and to exercise—huge market power over their independent ATM competitors. Moreover, banks are both payers and receivers of ATM fees, since they both operate ATMs and maintain consumer deposit accounts. Regulation (or lack thereof) that may be good for the banks’ ATMs is not necessarily good or appropriate for independent ATM deployers or the public they serve.

⁵ Most people have bank deposit accounts they can access via debit cards. Many people with low incomes or on public assistance do not find it feasible to maintain even a basic deposit account. Nevertheless, even this segment of the public can access financial networks, cash, and public benefits using pre-paid debit or credit cards.

⁶ For example, debit card network rules prohibit ATMs from charging differential surcharges based on the different interchange and network fees paid and imposed by the various networks, which inhibits price competition among the networks.

III. THE BOARD'S CONCLUSION THAT ATM INTERCHANGE FEES ARE NOT SUBJECT TO BOARD REGULATION IS SOUND POLICY THAT IS CONSISTENT WITH SECTION 920 AND THE PUBLIC INTEREST

A. The Widespread Availability Of ATMs—Particularly Non-Bank ATMs—Depends On Continued Payment Of Reasonable Interchange Fees

An ATM terminal typically costs thousands of dollars to buy and hundreds more to install. For non-bank ATM providers, the capital equipment and installation costs must be recovered from transaction fees. In addition, ATMs incur recurring costs for vaulting,⁷ repair, cleaning, theft and vandalism, location rent, a data line,⁸ sponsor costs,⁹ and network services.¹⁰ All these costs and more¹¹ must—in the case of independent ATM deployers—be recovered from transaction fees. Moreover, in the case of non-bank deployers any ATM that is not covering its own costs typically must and will be removed. Banks can maintain unprofitable ATMs as “loss leaders” for their other services and sources of income, as discussed above. Such a strategy is simply not available to independent ATM providers.

The other key distinction between the ATM Commenters' members and banks is that independent ATMs have a much lower transaction volume than bank ATMs—fewer than 300 transactions per month on average. Bank ATMs typically handle close to 8 times as many transactions, averaging over 2000 transactions a month. Obviously, the convenience of widespread deployment of ATMs to low

⁷ Loading cash in the machine. In addition to a truck roll to the location and technician time to load the cash, the ATM operator incurs the cost of maintaining the necessary cash reserves in all of its machines to handle the expected withdrawal requirements on an ongoing basis.

⁸ Or wireless connection.

⁹ Under network rules, every non-bank ATM ISO must have a sponsoring financial institution or “SFI”. The SFI charges a small fee for every single transaction the ATM generates.

¹⁰ Every ATM is connected by a data circuit to an ATM “processor.” The processor has access to the databases necessary to determine—from the information on the consumer's card—to which network or networks a requested transaction can be routed. The processor is interconnected with all the major national and regional networks, and can route the transaction to the appropriate network to conclude the transaction after it determines which network(s) is/are allowed. The fee charged to the ATM provider for these network services is not insignificant—up to about 10 cents a transaction.

¹¹ Such as GS&A (general service and administration); e.g. insurance, billing and payment costs, and sales.

volume locations does not come about for free.¹² Thus, while independent ATMs are less costly to install and maintain than bank ATMs, the significantly lower transaction volumes on non-bank ATMs mean that any reduction in per transaction fees is much more likely to threaten the continued deployment of those non-bank ATMs at any given location.

Moreover, as the NPRM notes, the interchange fee for ATM transactions is a fee **paid** by the cardholders' issuing banks, rather than received by them from consumers, as in the case of merchant point of sale ("POS") transactions. This reverse flow makes sense economically. The banks and networks wanted their debit cards to have widespread adoption. The more locations at which the cards could be accepted, the more valuable their cards would be. Banks and networks realized that independent ATM operators could not maintain their ATM terminals without a source of revenues, and thus implemented the system of interchange payments to non-bank ATMs that we have today.¹³ The average interchange paid to independent ATM deployers has dropped significantly over the last five years. First, in 2005, VISA (through its PLUS network) cut ATM interchange fees using a "tiering" scheme that effectively reduced non-bank ATM interchange by 10 cents, without similarly affecting the interchange paid to most bank-owned ATMs. In 2010, MasterCard (through its CIRRUS network) cut net interchange almost in half, by both reducing the interchange paid to non-bank ATMs and increasing the countervailing "fee" charged to these ATMs. The net fee from a MasterCard transaction is now often less than 10 cents flowing to the independent ATM operator.

Unfortunately, consumers are not insulated from the adverse impact of ATM interchange cuts, because interchange cuts dramatically reduce independent ATM deployment. As the chart above shows, the increasing availability and convenience of ATMs that consumers enjoyed for over a decade came to a halt in 2005, when Visa slashed interchange. In a competitive ATM market, and based upon the issuer imposed prohibition against differential surcharging, independent ATM providers found it difficult or impossible to recover the lost interchange through increased surcharges. Thus, with margins reduced, the non-bank ATM sector was

¹² Convenience generally costs more in any market. For instance, Costco sells bottled water in cases for about 25 cents a bottle. Many hotels sell similar bottles in guest rooms for about \$4.00 a bottle. Many hotel guests choose to pay 16 times as much as they could simply for the convenience. Likewise, the hotel incurs higher costs to stock the water, as they do so one bottle at a time, rather than a pallet load at a time, as with Costco. As such, this is an example of a reasonable market-based price differential.

¹³ Thus, networks pay an interchange fee to ATM operators which, until relatively recently, averaged about 50 cents per cash withdrawal. Even at this level, the fee is less than half the average cost for an independent ATM deployer to handle a transaction.

forced to dramatically reduce new ATM deployments and in many cases had to remove lower volume ATMs.¹⁴ Equally concerning, the loss of access which consumers have suffered does not seem to have been offset in any way by a pass through of these ATM related interchange "savings" in the form of lower bank charges to consumers.¹⁵

B. Section 920(a)'s Fee Restrictions And Regulatory Authority Do Not Apply To ATM Transactions

The plain language of Section 920 makes it abundantly clear that the Board is not authorized to regulate interchange fees paid to ATM operators. The Board's authority is granted in Section 920(a)(1) and (2) and covers "any interchange transaction fee that an issuer may receive or charge." (Emphasis added). In ATM transactions, issuers do not "receive or charge" a fee. Instead, issuers pay (indirectly) a fee to ATM operators for an ATM transaction. Nor do ATM fees fall under the definition of an "interchange transaction fee," as set forth in Section 920(c)(8), which provides:

The term 'interchange transaction fee' means any fee established, charged or received by a payment card network for the purpose of compensating an issuer for its involvement in an electronic debit transaction.

Id. (emphasis added). ATM fees on non-bank ATMs are not "charged" by the payment card network and do not "compensate" an issuer.¹⁶ They compensate ATM operators and are paid by issuers—clearly a very different scenario than that addressed by the underlying statute—and one which does not involve a charge to consumers or merchants coincident with the sale of goods or services.

There can be no serious question that Congress did not authorize the Board to regulate ATM interchange fees as they are currently structured. The Board's

¹⁴ The removal of ATMs may accelerate, as marginal older machines reach the end of their useful lives and the cost of replacement can no longer be covered under the lower interchange environment.

¹⁵ Networks charge the interchange fee to the issuing bank for each given card. The network then passes a portion of that interchange to the ATM operators as a payment. Banks cover the interchange fee by imposing a "foreign ATM fee" on the customer. When networks cut their ATM interchange fees, banks should, in theory reduce their foreign ATM fee. However, the upward trend in foreign ATM fees charged by banks has continued unabated, despite recent major cuts in network ATM interchange fees.

¹⁶ Issuers may, coincidentally also be ATM operators. However, any compensation they receive from use of their ATMs is received in their capacity as ATM operators, not in their capacity as an issuer.

conclusion to this effect in the NPRM is correct and rests upon a solid legal and policy footing.

C. Section 920's Distinction Between POS And ATM Transactions For Fee Regulation Makes Sense And Is In The Public Interest

The reason for the foregoing lengthy discussion of the background of the ATM industry is intended to help the Board understand how very different the ATM industry is from POS transactions and, therefore, why it would not have been in the public interest for Congress to authorize regulation of ATM interchange fees. Accordingly, the Board should not be tempted to, nor could it lawfully, impose such regulation by rule in the absence of specific Congressional authorization.

The ATM Commenters understand that one of the principal reasons Congress chose to regulate POS interchange fees is the inequity of who bore the costs of such fees. Because networks prohibited so-called “discrimination” by merchants in recovering these costs, the merchant had to spread the cost of POS transaction fees among all of its customers—both those who caused the costs and those who did not. Thus, consumers who paid cash were effectively subsidizing consumers using debit cards. Since it was presumed that low income consumers were more likely to use cash than a bank card, the inequity of such a subsidy was viewed as even greater.

In contrast to the POS fee, the ATM interchange fee is paid by the card issuer, and the ATM surcharge fee is only paid by the person who actually uses the ATM. And, these fees are only paid in proportion to how often the consumer uses the ATM. In other words, the cost-causer and the benefitting issuer pay the full costs of the transaction and do not receive any subsidies from consumers who do not use ATMs. In this same regard, the consumer can avoid the ATM fees altogether by simply choosing not to use an ATM and/or by using their own bank's ATM, which is not the case for a purchase of goods or services where such costs are built into the product price regardless of how the purchaser pays.

There is another reason the interchange fee cap is ill advised and makes no sense for ATM transactions, namely the relative cost of the transactions in the two different interchange worlds. As discussed above, the cost of an ATM transaction to the machine provider is significant. Indeed current interchange fees are not nearly adequate to fully cover the ATM's costs. By contrast, the cost to a bank¹⁷ of processing a merchant transaction is relatively low. Banks only must cover the costs

¹⁷ Again, the bank receives the fee in a POS transaction.

of their data line, network fees and costs, and data processing costs for these transactions—some of which are shared with other banking functions; *e.g.* the mainframe computer which maintains and tracks accounts. Thus, Bank POS processing costs are largely digital and therefore very low, as the Board has observed. Moreover, those digital costs are shared among millions or even billions of transactions, as compared to just hundreds or thousands for ATM operators.

IV. THE BOARD SHOULD ADOPT “ALTERNATIVE B” TO IMPLEMENT SECTION 920’S PROHIBITION ON SINGLE NETWORK RESTRICTIONS FOR EVERY TRANSACTION USING A DEBIT CARD

Section 920(b)(1) contains certain prohibitions on networks and issuers’ restricting cards and transaction routing to a single network. The intent of Congress was to make the electronic debit network market more competitive and thus lead to lower fees for consumers and continued support for widespread ATM deployment. The Board has asked for comment on two alternative approaches to implementing this prohibition.

The ATM Commenters submit that only the Board’s “Alternative B”¹⁸ will effectuate the letter, spirit, and goals of Congress in passing Section 920(b)(1), which states, in pertinent part:

[A]n issuer or payment card network shall not directly or through any agent, processor, or licensed member of a payment card network, by contract, requirement, condition, penalty, or otherwise, restrict the number of payment card networks on which an electronic debit transaction may be processed to [a single network or multiple but affiliated networks].

The key language in this subsection is that “an electronic debit transaction” may not be restricted to a single network—without exception. Congress prohibited any electronic debit transaction from being restricted to a single network, “by contract, requirement, condition, penalty, or otherwise.” *Id.* (emphasis added). No agreement, device, or even historic artifact may permit single network restrictions.

¹⁸ “Under Alternative B, an issuer or payment card network may not restrict the number of payment card networks over which an electronic debit transaction may be carried to less than two unaffiliated networks for each method of authorization the cardholder may select. Under this alternative, an issuer that uses both signature- and PIN-based authorization methods will have to enable its debit cards with two unaffiliated signature-based networks and two unaffiliated PIN-based networks.”

An “electronic debit transaction” under Section 920(c)(5) is defined very broadly as “a transaction in which a person uses a debit card.” Thus, in prohibiting single network restrictions, Congress provided that when “a person uses a debit card” that transaction must have at least two non-affiliated networks available to complete the transaction. The Board’s Alternative A does not meet this Congressional directive in many, many types of transactions. Of greatest relevance here, ATM transactions can only be processed as PIN-based authorizations.¹⁹ As discussed below, Section 920(b) does apply to ATM transactions. Therefore, Alternative A,²⁰ if adopted, would as a real-world matter lead to nearly 15 billion annual ATM-conducted “electronic debit transactions” being restricted to a single network, in direct contravention of Congress’ prohibition on such a restriction.

As just one POS example, the NPRM notes that just one-quarter of merchant locations in the U.S. which accept debit cards can accept PIN-based transactions. Thus, unless the Board adopts Alternative B, POS transactions at three-quarters of the merchant locations in the U.S. would—in practice—be susceptible to a single network restriction. Again, Congress’ directive would be effectively thwarted for millions if not billions of merchant POS transactions annually if Alternative A were adopted.

Alternative B is thus required to ensure that all transactions covered by Section 920(b)(1) can in fact access at least two independent networks. This puts no additional or undue burden on issuers. PIN-based only cards and signature-based only cards each simply need to allow for at least two networks. And cards that are both PIN and signature-based still only need to allow two or more networks for each transaction mode. The ATM Commenters do not believe that adoption of Alternative B requires that four networks be allowed, just that for each and every type of “electronic debit transaction” at least two are available.

¹⁹ As the Board noted in the NPRM, the concerns expressed by some issuers with respect to a potential compromising of cardholder perks (such as extended warranties on product purchases or “free” travel insurance on airline ticket purchases) that are alleged by such issuers, should availability of more than one network be required, are not typically applicable to PIN-based cards. Since all ATM transactions use PIN based cards, there should be little or no cause for concern about lost cardholder perks in requiring two networks to handle ATM debit card transactions, in accord with the letter and intent of the statute.

²⁰ "Under Alternative A: an issuer or payment card network may not restrict the number of payment card networks over which an electronic debit transaction may be carried to fewer than two unaffiliated networks. Under this alternative, it would be sufficient for an issuer to issue a debit card that can be processed over one signature based network and one PIN-based network, provided the networks are not affiliated."

V. THE REQUIREMENTS OF SECTION 920 PROHIBITING SINGLE-NETWORK RESTRICTIONS DO APPLY TO ATM TRANSACTIONS

The Board requests comment on several questions regarding the application and implementation of Section 920(b)(1) with respect to ATM transactions:

For example, if the Board requires two unaffiliated networks for each authorization method, should it explicitly require an issuer to ensure that ATM transactions may be routed over at least two unaffiliated networks? Should the Board state that one point-of-sale debit network and one ATM-only network would not satisfy the exclusivity prohibition under either proposed alternative?

As discussed above, the ATM Commenters believe that Congress left no room to interpret Section 920 in a way that would allow networks and issuers to evade the single network prohibition on any transaction using a debit card. As such, the ATM Commenters would support the Board issuing the explicit statements cited above, to avoid creating any question or dispute over what is crystal clear in the statute.

As discussed in the preceding section, ATM transactions are transactions “in which a person uses a debit card” and therefore are “electronic debit transactions” as defined in Section 920(c)(5). Since the prohibitions on single-network restrictions in Section 920(b)(1) apply to all “electronic debit transactions,” they unquestionably cover ATM transactions. If Congress had intended the restriction to apply only to POS transactions, it could have defined “electronic debit transaction” to mean a “purchase” “in which a person uses a debit card” instead of “a transaction in which a person uses a debit card.” *See* Section 920(c)(5). That the Congress used “transaction” and not “purchase” should end the inquiry on this point.

This handling of the issue is clearly in the public interest, because the availability of competitive network routing will help to assure a reasonable and market-based level of interchange fees. Fair interchange compensation to ATM providers serves to foster the continued widespread availability of non-bank ATMs to consumers, by providing a more stable and reasonable interchange payment platform from which to help defray ATM deployment and maintenance costs.

VI. THE ATM COMMENTERS FIND NO BASIS FOR A DIFFERENTIAL APPLICATION OF THE SINGLE NETWORK PROHIBITIONS TO A THREE VERSUS FOUR-PARTY NETWORKING ARRANGEMENT

As discussed above, if a consumer conducts a transaction “in which a person uses a debit card,” this constitutes an “electronic debit transaction” as defined by Section 920(c)(5). Congress made no exception nor provided any limitation or differential treatment based upon the type of networking involved. Rather, it is the type of transaction that determines whether the restriction applies. Consistent with this, ATM Commenters are not aware of any adverse consequences that would result from an equal application of the single-network restrictions in Section 920(b)(1) to both three-party and four-party networking arrangements, nor are we aware of any factual basis upon which to justify such a different treatment.

VII. THE ATM COMMENTERS SUGGEST REVISIONS TO THE BOARD’S PROPOSED DEFINITIONS FOR CLARIFICATION AND GREATER CONSISTENCY WITH THE ACT

The proposed definitions in the NPRM do a good job of implementing Section 920 for merchant/POS transactions. Unfortunately, however, the focus on the POS perspective could lead to confusion and possible failure to properly implement the Act as to ATM transactions. As discussed above, the broad language of Section 920(b) and the broad definitions of the terms used in that subsection extend the scope to ATM “transactions.” But, for reasons apparently related to creating workable definitions for the POS world, the Board proposes a narrower definition of “electronic debit transaction” than the definition enacted by Congress.

The NPRM states that the proposed revised definition was based on the Act’s definition of “Payment Card Network.” *See* Section 920(c)(11). The problem with that logic is its suggestion that ATM debit networks somehow stand alone and are different than payment networks. To the contrary, in almost all cases, the same networks and processors carry both POS and ATM transactions. Thus, a “Payment Card Network” is—in the real world—also an ATM transaction network. Narrowing the Act’s definition of “transaction” to cover only “payments”—based on an assumption that Congress intended to create illusionary divisions of networks into two separate categories that do not exist in the real world—would thwart, rather than implement, the underlying Congressional intent. Presumably, this would also be an unintended consequence of the rule drafters.

In the statute, the definition reads: “The term ‘electronic debit transaction’ means a transaction in which a person uses a debit card.” Section

920(c)(5). But in the NPRM, the Board effectively changes the word “transaction” to “payment”: “Electronic debit transaction means the use of a debit card by a person as a form of payment in the United States.” Proposed 12 C.F.R. 235.2(h) (Emphasis added). Thus, unless an ATM transaction is deemed to be a “payment”²¹ the proposed rule could be interpreted—contrary to Section 920(b) itself—to exclude ATM transactions from its coverage. Since the Board requested comment on whether the Act covers ATM transactions, the ATM Commenters assume that the Board did not intend, by this definition, to pre-determine these issues.

Because, as discussed above, Section 920(b) does in fact apply to ATM transactions, the ATM Commenters urge the Board to modify the proposed definitions to clarify the proper scope of the Act as to ATM transactions. First, the Board should revise proposed 12 C.F.R. 235.2(h) to read: “Electronic debit transaction means the use of a debit card by a person as a form of payment or to conduct an ATM transaction in the United States.” Alternatively, 12 C.F.R. 235.2(h) could be kept the same as proposed, and the Board could instead adopt a definition of “payment” that “includes any transaction by a person that uses a debit card to access an ATM.”

Further, for clarity and consistency, the Board should consider revising proposed 12 C.F.R. 235.2(o) to state: “Processor means a person that processes or routes electronic debit transactions for issuers, acquirers, ~~or~~ merchants, or ATMs.” And, finally, proposed 12 C.F.R. 235.2(m) should be revised to read: “Payment card network means an entity that— * * * (2) Establishes the standards, rules, or procedures that govern the rights and obligations of issuers, ~~and~~ acquirers, and ATM operators involved in processing electronic debit transactions through the network.”

VIII. THE ATM COMMENTERS URGE THE BOARD NOT TO DELAY IMPLEMENTATION OF SECTION 920(B) TO 2013

As discussed above, recent reductions of interchange payments to ATM operators coupled with single network restrictions have halted if not reversed the growth and public convenience of expanded ATM networks. Accordingly, there exists the real possibility of irreparable harm to consumers, competition, and independent ATM industry sector if the Board delays implementation of Alternative B beyond October 1, 2011. Any issuer that makes a good faith effort to comply, but cannot do so by that date, should be required to seek a waiver from the Board, based upon a specific and compelling factual showing of good cause, and then only for the minimum time period necessary under the circumstances to become compliant. A

²¹ Which it certainly could be.

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blanket waiver for over a year extending to all issuers, whether they need that much time or not,²² is simply unjustified and contrary to the public interest.

Again, the ATM Commenters sincerely appreciate this opportunity to provide input to the Board, and we stand ready to provide any additional information or other assistance as may be required by the Board to timely and effectively complete its rule adoption process.

Respectfully submitted,

The National Association of ATM ISOs and
Operators ("NAAIO")

By: Brooks E. Harlow
Brooks E. Harlow, P.C. ,
Counsel for NAAIO

And

The ATM Council of the Alliance of
Specialized Communications Providers

By: Bruce W. Renard
Bruce W. Renard
ASCP-ATM Council, Executive Director

²² Indeed, many issuers already allow routing over multiple networks.