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**Via E-mail (regs.comments@federalreserve.gov) and Hand Delivery**

Jennifer J. Johnson, Secretary  
Board of Governors of the Federal Reserve System  
20th Street and Constitution Avenue, N.W.  
Washington, D.C. 20551  
(202) 452-3259

**Re: Proposed Rule on Debit Card Interchange Fees, Docket No. R-1404**

Dear Ms. Johnson:

We write on behalf of several banking clients<sup>1</sup> to comment on the pending rulemaking pursuant to the Durbin Amendment, 15 U.S.C. § 1693o-2, an amendment to the Electronic Fund Transfer Act ("EFTA"), Subchapter VI of the Consumer Credit Protection Act, 15 U.S.C. § 1693 *et seq.* We submit this comment prior to the Federal Reserve Board's ("Board") publication of a final regulation to be sure that the Board has carefully considered the issue of whether business debit transactions are covered by the Durbin Amendment. In our view of the statute, they are not.

Others have addressed this issue in prior comments, notably Visa, Chase, Navy Federal Credit Union, and the Merchants Payments Coalition.<sup>2</sup> However, given the magnitude of the issue, we raise it again to be certain that the Federal Reserve has the benefit of an additional viewpoint.

The EFTA is a consumer protection statute relating to the electronic transfer of funds. *See* 15 U.S.C. § 1693(a) ("[T]he application of existing consumer protection legislation is unclear, leaving the rights and liabilities of consumers, financial institutions, and

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<sup>1</sup> This firm is co-counsel to TCF National Bank in *TCF National Bank v. Bernanke et al.*, Case No. 4:10-cv-04149-LLP (D. S.D.).

<sup>2</sup> *See* Comment Letters from Visa General Counsel Joshua R. Floum to Jennifer J. Johnson, Secretary of the Board of Governors of the Federal Reserve System, at pg. 37, dated February 22, 2011; Chase CEO Ryan McInerney to Jennifer J. Johnson, Secretary of the Board of Governors of the Federal Reserve System, at pg. 21, dated February 22, 2011; Navy Federal Credit Union President & CEO Cutler Dawson to Jennifer J. Johnson, Secretary of the Board of Governors of the Federal Reserve System, at Enclosure pg. 8, dated February 22, 2011; Attorneys Jeffrey I. Shinder and Todd Anderson, Constantine Cannon, on behalf of the Merchants Payments Coalition, to Louise L. Roseman, Director, Division of Reserve Bank Operations and Payment Systems of the Federal Reserve System, at pg. 6, dated December 1, 2010.

intermediaries in electronic fund transfers undefined.”). The EFTA’s “primary objective . . . is the provision of individual consumer rights.” 15 U.S.C. § 1693(b).

The EFTA does not apply to accounts used primarily for the purposes of a business enterprise. Rather, the EFTA clearly defines the term “account” to mean consumer accounts only:

[A] demand deposit, savings deposit, or other asset account (other than an occasional or incidental credit balance in an open end credit plan as defined in section 1602(i) of this title), as described in regulations of the Board, *established primarily for personal, family, or household purposes*, but such term does not include an account held by a financial institution pursuant to a bona fide trust agreement.

15 U.S.C. § 1693a(2) (emphasis added). This definition of “account” applies “[a]s used in this subchapter,” *i.e.*, whenever the term is found in the EFTA, including the newly added Durbin Amendment. *Id.*

The Durbin Amendment is designed to address a certain form of electronic funds transfer – debit transactions. However, it does *not* define or otherwise abrogate the definition of “account” found in the EFTA, and hence the Durbin Amendment applies only to consumer debit transactions.

In its proposed rule, the Board noted that the Durbin Amendment defines the term “debit card” as:

[A]ny card, or other payment code or device, issued or approved for use through a payment card network to debit an asset account (*regardless of the purpose for which the account is established*), whether authorization is based on signature, PIN, or other means.

75 Fed. Reg. 81722, 81729 (December 28, 2010), quoting 15 U.S.C. § 1693o-2(c)(2) (emphasis added). This definition of “debit card” can and must be read harmoniously with the EFTA’s definition of “account.” See 1A Norman J. Singer & J.D. Shambie Singer, § 22:34 *Statutes and Statutory Construction* (7th ed. 2009) (“[P]rovisions introduced by an amendatory act should be read together with provisions of the original section that were reenacted or left unchanged as if they had been originally enacted as one section. Effect is to be given to each part, and they are interpreted so they do not conflict.”); see also *Hartigan v. Fed. Home Loan Bank Bd.*, 746 F.2d 1300, 1305-06 (7th Cir. 1984) (“When Congress has stated an intention to amend a pre-existing act, this court *will not lightly interpret* that amendment to preclude the application of the terms of the amended act to the amending provisions.”), citing *Republic Steel Corp. v. Costle*, 581 F.2d 1228, 1232 (6th Cir. 1978) (“Amendments should be given ‘the most harmonious, comprehensive meaning possible, avoiding conflicts with the amended provisions.’”).

Reading the EFTA and Durbin Amendment together, the Durbin Amendment applies to all types of consumer accounts, “regardless of the purpose for which the account is established.” In other words, it applies to personal, household, and family accounts, and any other consumer account no matter the consumer’s purpose in opening the account. This harmonious reading appropriately takes into account all terms found in the relevant provisions. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (“It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.”) (citation omitted).

Other terms in the Durbin Amendment support this harmonious reading. For example, the two exemptions found in the Durbin Amendment clearly relate to consumer accounts. The first exemption is for a card “provided to a person” – not a business – “pursuant to a Federal, State, or local government administered payment program” when the card is used to transfer funds obtained under the program. 15 U.S.C. § 1693o-2(a)(7)(A)(i). Such “persons” are classic consumers engaged in classic consumer transactions – the only difference is that the government provides the source of the funds. Similarly, the second exemption for so-called “pre-paid” cards involve consumer cards only; business debit cards are attached to business depository accounts, so no prepaid card may be connected to a depository account. *Id.* § 1693o-2(a)(7)(A)(ii).

Contrary to the Board’s proposed rule, the Durbin Amendment cannot be read to expand the definition of “account” in the EFTA. Such construction would put the EFTA and Durbin Amendment at odds, with discordant definitions going to the heart of the EFTA’s consumer focus. Certainly Congress would have made clear such a fundamental change in the law by, for example, saying “regardless of whether a business or consumer account.” *See, e.g., Miles v. Apex Marine Corp., et al.*, 498 U.S. 19, 32 (1990) (it is appropriate to assume that Congress is aware of existing law when it passes or amends legislation), citing *Cannon v. Univ. of Chicago*, 441 U.S. 677, 696–97 (1979). But Congress did not do so here, and the agency is bound by the statute in promulgating regulations. *See Dixon v. United States*, 381 U.S. 68, 74 (1965) (a regulation that “operates to create a rule out of harmony with the statute, is a mere nullity.”), quoting *Manhattan Gen. Equip. Co. v. Comm’r of Internal Revenue*, 297 U.S. 129, 134 (1936). Indeed, Senator Durbin expressly noted the “consumer protection” focus of the EFTA in selecting that statute for his Amendment. *See* 156 Cong. Rec. S3589 (daily ed. May 12, 2010) (statement of Sen. Durbin) (“This is a good place because it related to consumer protection, it relates to financial institutions, it relates to our economy and making sure it thrives, and thrives in a responsible way.”).

Hence, in its final regulation, the Board should recognize that debit transactions involving business enterprise accounts are not covered by the Durbin Amendment.

Very truly yours,



Ronald R. Glancz

**cc:**

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