SULLIVAN & CROMWELL LLP

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Via E-mail

MEMORANDUM TO: Scott G. Alvarez, General Counsel
Board of Governors of the Federal Reserve System

FROM: H. Rodgin Cohen
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RE: Interpretation of the Network Exclusivity Provision of Section 920(b)(1) of the Electronic Fund Transfer Act

Section 920(b)(1) of the Electronic Fund Transfer Act (the "EFTA") directs the Board of Governors of the Federal Reserve System (the "Board") to "prescribe regulations providing that an issuer or payment card network shall not . . . by contract, requirement, condition, penalty, or otherwise, restrict the number of payment card networks on which an electronic debit transaction may be processed" to one such network. 15 U.S.C. § 1693o-2(b)(1) (2011). In its proposed rulemaking, the Board stated that Section 920(b)(1) "does not provide any apparent basis for excluding three-party systems from the scope of [its] provisions."[1]

We submit this memorandum on behalf of our client, American Express Company ("American Express"), as a follow-up to our April 20, 2011, meeting to explain why we believe that the language of Section 920(b)(1) does not permit, and certainly

[1] Debit Card Interchange Fees and Routing; Proposed Rule, 75 Fed. Reg. 81,722, 81,728 (Dec. 28, 2010) (to be codified at 12 C.F.R. pt. 235).

does not require, the Board to promulgate network exclusivity regulations that encompass closed loop, three-party networks ("Closed Loop Networks"). The application of such regulations to Closed Loop Networks would be contrary to the statute under well-established principles of statutory construction and would produce a result that is contrary to Congress' purpose in enacting the statute.

As we demonstrate below, Section 920(b)(1) applies only if the network exclusivity restriction is imposed by contract or similar contractual arrangement. Section 920(b)(1) does not apply if the restriction arises from the inherent configuration of the business activity, which is the case in a Closed Loop Network like the network over which American Express' prepaid card transactions are processed.

1. *Analytic Framework for the Interpretation of Section 920(b)(1).*

The starting point in all statutory interpretation is the text of the statute. *Lamie* v. *United States Tr.*, 540 U.S. 526, 534 (2004). "It is well established that when the statute's language is plain, the sole function of the courts -- at least where the disposition required by the text is not absurd -- is to enforce it according to its terms." *Id.* (internal quotation omitted). When interpreting a statute, a federal agency is required to follow this same principle. *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."); *Dep't of Hous. & Urban Dev.* v. *Rucker*, 535 U.S. 125 (2002) (reversing court of appeals' decision upholding agency decision because the agency's decision failed to give effect to the unambiguous meaning of the statute).

If, however, there is not a clear or plain meaning to the statute, a regulatory agency must apply the traditional tools of statutory construction to discern Congress' intent in enacting the statute. *N.L.R.B.* v. *United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 123 (1987) ("On a pure question of statutory construction, our first job is to try to determine congressional intent, using traditional tools of statutory construction. If we can do so, then that interpretation must be given effect, and the regulations at issue must be fully consistent with it.") (internal citation omitted); *Pub. Citizen* v. *Nuclear Regulatory Comm'n*, 901 F.2d 147, 157 (D.C. Cir. 1990) (holding that agency erred in failing to resolve statutory ambiguity by resorting to principle of statutory construction of *ejusdem generis*); *accord Chevron*, 467 U.S. at 843 n.9 ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.").

2. *The Ambiguity in Section 920(b)(1).*

In Section 920(b)(1), Congress did not provide that the prohibition on restricting an electronic debit transaction to one network was absolute. Rather, Congress prohibited such a restriction only if it occurs by one of five means: "contract, requirement, condition, penalty, or otherwise." The first four of these terms are straightforward and do not apply to Closed Loop Networks. In a Closed Loop Network, there is no contractual restriction of any sort limiting the processing of a debit card transaction to one network. Nor is there any contractual-type requirement, condition or penalty limiting such processing.

Accordingly, the network exclusivity prohibition in Section 920(b)(1) can be applied to a Closed Loop Network only through the general word "otherwise." The meaning of this word, standing alone, is not plain. Read in context, it can have two quite different meanings. First, it can mean "in any manner whatsoever." Second, it can mean "in a manner similar to the type of exclusivity arrangements that are specifically identified."

This ambiguity is reflected in dictionary definitions. For example, Merriam-Webster defines otherwise as "something or anything else." Merriam-Webster's Collegiate Dictionary 823 (10th ed. 1999). "Something," a specific reference, is a subset of the general "anything else." Just three years ago, the Supreme Court quoted a different dictionary definition of "otherwise" as "'in a different way or manner.'" *Begay* v. *United States*, 553 U.S. 137, 144 (2008) (quoting Webster's Third New International Dictionary 1598 (1961)). Of note, this definition refers to *a* different way and not, more broadly, *any* different way.

Indeed, in *Begay*, the Court recognized that the inclusion of a residual "or otherwise" clause in a statute did not result in the conclusion that the statute's sweep should be broadly read as opposed to being limited by the preceding specific terms. 553 U.S. at 144. In construing the phrase "burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another," the *Begay* Court stated:

> we cannot agree with the Government that the word 'otherwise' is *sufficient* to demonstrate that the examples do not limit the scope of the clause. That is because the word 'otherwise' *can* (we do not say *must*, cf. [concurring opinion]) refer to a crime that is similar to the listed examples in some respects but different in others.

Id. The Court concluded that "otherwise" applied only to those "crimes that are roughly similar[] in kind." *Id.* at 143. Other courts have found this same lack of clarity in similar residual clauses. *See, e.g., United States* v. *Pacione*, 738 F.2d 567, 570 (2d Cir. 1984) (finding statute's use of "other criminal means" ambiguous).[2]

Confronted with such ambiguity, courts turn to various recognized interpretive principles of statutory construction.

3. *The Principle of* Ejusdem Generis *Resolves the Interpretive Issue in Section 920(b)(1).*

It is a basic principle of statutory construction that "'[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.'" *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 114-15 (2001) (defining and applying principle of *ejusdem generis*) (quoting 2A N. Singer, Sutherland on Statutes and Statutory Construction § 47.17 (1991)); *Gooch* v. *United States*, 297 U.S. 124, 128 (1936). Specifically, "[t]he words 'other' or 'any other' following an enumeration of particular classes ought to be read as 'other such like' and to include only those of like kind or character." *In re Bush Terminal Co.*, 93 F.2d 659, 660 (2d Cir. 1938) (internal citations omitted).

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[2] In addition, courts have often noted that inconsistent dictionary definitions of the type described above render statutory language ambiguous. *See Nat'l R.R. Passenger Corp.* v. *Boston & Me. Corp.*, 503 U.S. 407, 418 (1992) ("The existence of alternative dictionary definitions for 'required' indicates that the statute is open to interpretation."); *Sec'y of Labor, Mine Safety & Health Admin.* v. *Nat'l Cement Co. of Cal., Inc.*, 494 F.3d 1066, 1074 (D.C. Cir. 2007) (holding statute ambiguous in light of multiple meanings of word "private").

Applying the principle of *ejusdem generis*, the residual clause of Section 920(b)(1), "or otherwise," is limited in meaning by the preceding use of the terms "contract, requirement, condition [or] penalty." Contracts are arrangements that could provide directly for network exclusivity, and requirements, conditions or penalties are contractual provisions that could do the same.[3] These other four enumerated means of imposing exclusivity in Section 920(b)(1) are all contractual or contractual-type arrangements between two of the parties to an electronic debit transaction that cause those transactions to be processed on one network. Each involves a two-party agreement regarding exclusivity, and each involves a mandate imposed by the network provider on the issuer.

Thus, under the principles of statutory construction, the residual "or otherwise" clause prohibits only other, similar types of contractual exclusivity arrangements restricting the processing of electronic debit transactions to one network. *See Wash. State Dep't of Health Servs.* v. *Guardianship Estate of Keffeler*, 537 U.S. 371, 384-85 (2003) (holding meaning of "other legal process" limited by enumerated types of legal processes); *Begay*, 553 U.S. at 144 (applying *ejusdem generis* (without citing the principle of construction)[4] to limit the meaning of the phrase "otherwise involves conduct that presents a serious potential risk of physical injury to another" to "crimes that are

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[3] To the extent that the word "requirement" is at all unclear, it "is given more precise content by the neighboring words with which it is associated" by applying the canon of statutory construction known as *noscitur a sociis*. *United States* v. *Williams*, 553 U.S. 285, 294 (2010). In this case, the word "requirement" must be interpreted as akin to a "contract," "condition" or "penalty."

[4] The Seventh Circuit has acknowledged that the Supreme Court applied the principle of *ejusdem generis* in *Begay*. *United States* v. *Templeton*, 543 F.3d 378, 380 (7th Cir. 2008).

roughly similar, in kind as well as in degree of risk posed," to the preceding enumerated crimes).[5]

In contrast, a Closed Loop Network involves no such contractual agreement or arrangement regarding an issuer's ability to utilize another network. There is no contractually imposed mandate. The arrangements among contracting parties prohibited in Section 920(b)(1) are entirely different from the inherent characteristics of a Closed Loop Network – one party, providing one integrated product for a fee directly agreed with the merchant – that does not restrict transaction processing via the contractual-type restrictions specified in Section 920(b)(1). Accordingly, the principle of *ejusdem generis* precludes such a broad interpretation of Section 920(b)(1) that would include a Closed Loop Network.

There may be a superficial similarity between a Closed Loop Network and a four-party network in the context of Section 920(b)(1), but, upon analysis, there are material differences. Network exclusivity in a four-party, open loop network ("Open Loop Network") is a matter of contract between the network and the issuer. In contrast, a Closed Loop Network is inherently limited to one network. It is not a matter of negotiation or contract, but a question of product design, inherent characteristics and configuration. Stated differently, in an Open Loop Network, exclusivity is a function of a demand by the network and a concession by the issuer; in a Closed Loop Network, there is neither demand nor concession.

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[5] *Cf. Ali* v. *Fed. Bureau of Prisons*, 552 U.S. 214, 225 (2008) (holding principle of *ejusdem generis* inapplicable because, unlike Section 920(b)(1), (a) the statute did not include "a list of specific items separated by commas and followed by a general or collective term" and (b) the included items lacked a common attribute).

The contrary interpretation – that the Board's regulations must prohibit all payment card networks that involve the processing of electronic debit transactions over only one network *without regard* to how such a limitation occurs – requires an interpretation of the residual clause that is contrary to the principle of *ejusdem generis*. Had Congress intended to sweep so broadly as to prohibit all payment card networks that limit in any way whatsoever the processing of electronic debit transactions to one network, it would not have needed to include in the statute a list of arrangements by which an issuer or a network could so limit the processing of such transactions. As the Supreme Court recognized when it construed a residual clause in *Circuit City Stores*, "there would be no need for Congress to use the phrases 'seamen' and 'railroad employees' if those classes of workers were subsumed within the meaning of the 'engaged in . . . commerce' residual clause." 532 U.S. at 114. *See also Bush Terminal Co.*, 93 F.2d at 660 ("if the Legislature had intended the general words to be used in their unrestricted sense, it would have made no mention of the particular classes"); *Begay*, 553 U.S. at 142 ("If Congress meant the latter, *i.e.*, if it meant the statute to be all-encompassing, it is hard to see why it would have needed to include the examples").[6]

So too here. Congress could simply have directed the Board "to prescribe regulations providing that an issuer or payment card network shall not restrict the number of payment card networks on which an electronic debit transaction may be processed to

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[6] *Cf. Dolan* v. *U.S. Postal Serv.*, 546 U.S. 481, 490 (2006) ("Had Congress intended to preserve immunity for all torts related to postal delivery -- torts including hazardous mail placement at customer homes -- it could have used similarly sweeping language in § 2680(b). By instead 'carefully delineating' just three types of harm (loss, miscarriage, and negligent transmission) . . . Congress expressed the intent to immunize only a subset of postal wrongdoing, not all torts committed in the course of mail delivery.").

one such network." If there were any question as to the comprehensiveness of such language, Congress could have included a phrase such as "by any means whatsoever" after "restrict." And, if Congress wanted to make clear that the specific terms it used were words of example rather than limitation, it could have used a phrase such as "including, without limitation, by contract, requirement, condition or penalty" after "restrict."

Congress took none of these approaches, and that should be conclusive. Indeed, in at least four different provisions of Dodd-Frank, Congress demonstrated that when it intended to prohibit any means of doing something, it knew how to do so expressly. Each of these provisions uses the phrase "by any means whatsoever" or "by any means."[7] The courts have consistently found that the combination of the use of a phrase in one section of a statute and its absence in another section argues strongly against any implication that the phrase was intended in the section where it is absent. For example, in *Sosa* v. *Alvarez-Machain*, the Supreme Court cited the "usual rule" that "when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended." 542 U.S. 692, 711 n.9 (2004) (internal quotation omitted); *see also United States* v. *Gonzales*, 520 U.S.

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[7] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 746, 124 Stat. 1376, 1738 (2010) ("It shall be unlawful for any person to steal, convert, or misappropriate, *by any means whatsoever*, information held or created by . . . .") (emphasis added); *id.* at 1750 ("Unlawful manipulation for purposes of this paragraph shall include, but not be limited to, delivering, or causing to be delivered for transmission through the mails or interstate commerce, *by any means* of communication whatsoever . . . .") (emphasis added); *id.* at 1868 ("Any person who falsely represents *by any means* (including, without limitation, through the Internet or any other medium of mass communication) . . . .") (emphasis added); *id.* at 1964 ("The term 'transmitting or exchanging funds' means receiving currency, monetary value, or payment instruments from a consumer for the purpose of exchanging or transmitting the same *by any means* . . . .") (emphasis added).

1, 5 (1997) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (internal quotation omitted).

Although it is unnecessary to consider the legislative history of Section 920(b)(1) because application of the principle of *ejusdem generis* has resolved the ambiguity therein,[8] the interpretation of that section compelled by this principle of statutory construction is fully consistent with the section's sparse legislative history. As explained by Senator Richard Durbin, the sponsor of the Section, Section 920(b) applies to "contractual arrangements" or "contractual restrictions," and only prohibits "certain specific enumerated anti-competitive practices." 156 Cong. Rec. S5,926 (2010).[9] The Board itself recognized that Section 920(b)(1) was aimed at these types of anti-competitive arrangements. 75 Fed. Reg. 81,748-49. Moreover, the background, context and purpose for Congress' enactment of Section 920(b)(1) confirm that the network

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[8] *See Circuit City Stores*, 532 U.S. at 119 ("As the conclusion we reach today is directed by the text of § 1 [as explicated by the principle of *ejusdem generis*], we need not assess the legislative history of the exclusion provision.").

[9] During the same floor statement, Senator Durbin also said that Section 920(b)(1) "is intended to enable each and every electronic debit transaction . . . to be run over at least two unaffiliated networks . . . ." 156 Cong. Rec. S5,926 (2010). Read in the context of Senator Durbin's entire explanation of Section 920(b), as such statement must be, *Lowe* v. *SEC*, 472 U.S. 181, 202 n.46 (1985), Senator Durbin's statement does not contravene the result dictated by application of the principle of *ejusdem generis*. In the paragraph immediately preceding the "each and every" statement, Senator Durbin repeatedly stated that Section 920(b) applies to "contractual arrangements" or "contractual restrictions" and that the "provisions describe precisely the boundaries over which payment card networks cannot cross with respect to these specific practices." 156 Cong. Rec. S5,926 (2010). *See also* 156 Cong. Rec. S3,625 (2010) (purpose of prior version of Section 920(b) is to limit imposition of anti-competitive restrictions).

exclusivity provisions were directed at and intended to apply only to Open Loop Networks. (*See infra* Part 6.)

Finally, and significantly, ignoring the principle of *ejusdem generis* and reading Section 920(b)(1) to prohibit restrictions of any kind, whether contractual or structural, converts a statutory prohibition on network exclusivity restrictions – as stated in Section 920(b)(1) – into an entirely different requirement that issuers affirmatively enable a second network for their debit cards. The statute contains no such requirement; Congress expressed no such intent; and the Board should not so require in its regulation. As discussed below, Senator Durbin and Representative Gregory Meeks, a member of the House Financial Services Committee and the House-Senate Conference Committee that negotiated the final language of Section 920(b)(1), made clear in comments to the Board that Congress' intent in enacting Section 920(b)(1) did not include a requirement that an issuer or payment card network affirmatively enable prepaid card transactions to be processed on a second network.[10]

4. *Other Principles of Statutory Construction Support the Interpretation of Section 920(b)(1) Compelled by Application of the Principle of* Ejusdem Generis.

A broad interpretation of the residual clause of Section 920(b)(1) would also run afoul of two other well-established principles of statutory construction. First, it is "a cardinal principle" of statutory construction "to construe a statute so that no

[10] The foregoing analysis supporting the application of the principle of *ejusdem generis* to the network exclusivity provision of Section 920(b)(1) applies with equal force to the routing restriction provision contained therein, which includes the same "or otherwise" residual clause following the terms "contract, requirement, condition, penalty."

provision is rendered inoperative or superfluous, void or insignificant." *Laurel Baye Healthcare of Lake Lanier, Inc.* v. *NLRB*, 564 F.3d 469, 472 (D.C. Cir. 2009) (internal quotation omitted). As discussed above, interpreting the residual clause broadly renders the terms "contract," "requirement," "condition" and "penalty" superfluous, for the residual clause would encompass all of them.

Second, "[l]iteral interpretation of statutes at the expense of the reason of the law and producing absurd consequences . . . has frequently been condemned." *Sorrells* v. *United States*, 287 U.S. 435, 446 (1932); *Ma* v. *Ashcroft*, 361 F.3d 553 (9th Cir. 2004) (denying deference to an agency interpretation that produced an absurd result). "General terms should be so limited in their application as not to lead to . . . an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter." *Sorrells*, 287 U.S. at 447; *accord Armstrong Paint & Varnish Works* v. *Nu-Enamel Corp.*, 305 U.S. 315, 333 (1938) ("to construe statutes so as to avoid results glaringly absurd, has long been a judicial function").[11]

Interpreting the residual clause in Section 920(b)(1) broadly produces an absurd result wholly contrary to Congress' purpose in enacting the statute. It would effectively destroy the very structure of Closed Loop Networks, as the Board itself recognized,[12] with no attendant competitive or consumer benefits, which are the very

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[11] *Accord In re Maxway Corp.*, 27 F.3d 980, 982-83 (4th Cir. 1994) (observing that courts "should venture beyond the plain meaning of a statute" when "a literal application [thereof] would produce an absurd result.") (internal citation omitted).

[12] 75 Fed. Reg. 81,728.

purpose of the statute. A broad interpretation would require Closed Loop Networks to reconfigure their networks, at significant expense, to allow transactions to be routed over another network, only to be pointlessly routed back to the Closed Loop Network in its role as acquirer. This is an absurd result. There is no indication whatsoever that Congress sought to destroy Closed Loop Networks, and substantial evidence to the contrary, as discussed below.

Closed Loop Networks do not restrict the processing of electronic debit transactions to one payment card network by contract or any contractual provision, *e.g.*, by requirement, condition or penalty, but by the inherent configuration of the business model (long pre-dating the enactment of Section 920(b)(1)) and technical limitation. The business model of a Closed Loop Network involves the routing of all electronic debit transactions generated by its cards through its proprietary network. Transactions involving prepaid cards issued by a Closed Loop Network in its role as issuer are routed over a single network—the Closed Loop Network itself.

Because there is no purpose in routing such transactions over another network, Closed Loop Networks were not designed with the technical capacity to do so, and it is not presently possible for Closed Loop Networks to route electronic debit transactions over another network. Closed Loop Networks are therefore not preventing merchants from exercising a routing choice they would otherwise have, as is the case with debit card transactions processed over Open Loop Networks. Thus, Closed Loop Networks, which inherently involve only a single party providing an integrated product,

do not restrict the processing of electronic debit transactions to one network by contract, requirement, condition, penalty or any other similar arrangement.[13]

5. *The Views of Key Congressmen Should Be Considered.*

There is no direct legislative history dealing with the application of Section 920(b)(1) to Closed Loop Networks. Nonetheless, we believe, for the reasons discussed below, that the Federal Reserve should accord substantial weight to the views of the Congressional sponsor of the provision, Senator Durbin, and one other key Congressman, Representative Meeks, as expressed during the comment period.

Senator Durbin has emphasized that it was *not* the intent of Congress that Section 920(b)(1) prohibit Closed Loop Networks from continuing to process electronic debit transactions on one network. In a comment letter to the Board, dated February 22, 2011, Senator Durbin explained that "because three-party systems do not currently operate to a significant degree in the debit card space, they were not the intended focus of the non-exclusivity and routing provisions."[14] Rather, "the intent behind [Section 920(b)(1)(A)] was to inhibit the continued consolidation of the dominant debit networks' market power and to ensure competition and choice in the debit network market."[15] He further noted that the "dominant debit networks" are the "four-party networks such as

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[13] In contrast, Open Loop Networks do restrict the processing of PIN-debit card transactions by contract, requirement, condition, penalty or other similar arrangement. But for these contractual arrangements between issuers and networks, such transactions could be and were processed over the PIN-enabled network of the bank or merchant's choice until the Open Loop Networks began imposing contractual restrictions on the routing of such transactions. (*See infra* Part 6.)

[14] (Letter from Richard Durbin, U.S. Senator, to Jennifer Johnson, Secretary, Board of Governors of the Federal Reserve System, at 16.)

[15] (*Id.* at 11.)

Visa,"[16] not the Closed Loop Network operated by American Express. Indeed, the focus of all of Section 920 was the dominant Open Loop Networks. As Senator Durbin explained:

> the core problem with the interchange transaction fee in the four-party system – the centralized fixing of fees by a network for the purpose of compensating many separate issuers – is not a concern in the three-party model where the network and issuer are the same. . . . there does not appear to be an appropriate application of the EFTA Section 920(a) interchange fee standards to the three-party systems in place today.[17]

Similarly, Representative Meeks has written that "the premise behind [Section 920(b)(1)] was never to require prepaid cards to be structured to run on multiple payment networks."[18] Rather, the regulations should prohibit issuers and networks "from inhibiting a merchant's ability to direct the routing of *debit* card transactions over the enabled network of their choice."[19]

We recognize that, in many circumstances, courts afford little weight to post-enactment statements of individual Congressmen. *Sullivan* v. *Finkelstein*, 496 U.S. 617, 628 n.8 (1990). Nonetheless, where, as here, the post-enactment statements are of two Members of Congress directly and importantly involved in the enactment of the statute at issue, and comport with the interpretation dictated by principles of statutory construction, those statements should be accorded weight. *Cannon* v. *Univ. of Chicago*, 441 U.S. 677, 686 n.7 (1979) ("Although we cannot accord [post-enactment] remarks

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[16] (*Id.*)

[17] (*Id.* at 15-16.)

[18] (Letter from Gregory Meeks, Member of Congress, to Ben Bernanke, Chairman, Board of Governors of the Federal Reserve System (Feb. 21, 2011).)

[19] (*Id.*)

[concerning Title IX] the weight of contemporary legislative history, we would be remiss if we ignored these authoritative expressions concerning the scope and purpose of Title IX"); *Phillips* v. *Larry's Drive-In Pharmacy, Inc.*, 647 S.E.2d 920, 925 (W. Va. 2007) ("Post-enactment statements by an individual legislator are suggestive of the Legislature's intent, and certainly might be considered when the statements are consistent with the statutory language and legislative history.") (internal quotation omitted).[20] Moreover, the courts appear to allow for even greater weight to be accorded in the rulemaking context. *PDK Labs.* v. *DEA*, 438 F.3d 1184, 1192 (D.C. Cir. 2006) ("In exercising delegated authority to resolve statutory ambiguity, agencies can and should consider policy input from a wide variety of sources, including the views of private citizens, industry groups, non-governmental organizations, legal commentators, and, most certainly, Congress.").[21]

6. *Policy Considerations and Legislative Context.*

Regulations that would apply Section 920(b)(1) to Closed Loop Networks and require them to alter fundamentally their business model to operate as an Open Loop

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[20] The Supreme Court has held that remarks by the sponsor of language ultimately enacted in legislation "are an authoritative guide to the statute's construction." *N. Haven Bd. of Ed.* v. *Bell*, 456 U.S. 512, 526-27 (1982); *Fed. Energy Admin.* v. *Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976) (statement of statute's sponsor "deserves to be accorded substantial weight in interpreting the statute").

[21] The case law criticizing the use of subsequent legislative history frequently does so in the context either of statements that contradict the plain language of the statute or statements made by later Congresses. *See, e.g., Am. Fed'n of Gov't Employees* v. *Fed. Labor Relations Auth.*, 712 F.2d 640, 647 (D.C. Cir. 1983); *Solid Waste Ag.* v. *U.S. Army Corps of Eng'rs*, 531 U.S. 159, 169 (2001). Neither criteria is present here—members of the same Congress have advanced in writing an intent of Congress consistent with the statute's text.

Network would thus be directly contrary to Congress' clear purpose. Such regulations would not promote competition, but inhibit it. First, requiring Closed Loop Networks to reconfigure their networks to allow transactions involving their prepaid cards to be processed on another network would not in any way promote competition in the market for the processing of electronic debit transactions over Open Loop Networks. Instead, it would impair the ability of Closed Loop Networks to compete (through innovation and alternative product offerings) with the dominant Open Loop Networks by imposing on the Closed Loop Networks the heavy cost of reconfiguring their networks to allow transactions to be processed over other networks.[22] *See* 75 Fed. Reg. 81,728 ("The Board recognizes that the nature of a three-party system could be significantly altered by any requirement to add one or more unaffiliated payment card networks capable of carrying electronic debit transactions involving the network's cards.").

Second, it could raise costs to consumers. The Closed Loop Networks would have no choice but to pass on to the merchants both the high cost of reconfiguring their networks and the increased cost of pointlessly routing their transactions over another network only to have them sent back to the Closed Loop Network. Those merchants would in turn pass those costs on to consumers. No benefit to consumers would offset these costs.[23]

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[22] *See* U.S. Department of Justice & Federal Trade Commission, *Horizontal Merger Guidelines*, § 2.1.5 (2010) (recognizing value of "maverick" firms in an industry that employ different technology or business models).

[23] For a more fulsome discussion of the impact of application of Section 920(b)(1) to the operation of a Closed Loop Network, please see (a) the letter from Anne Segal, Managing Counsel, American Express, to Jennifer Johnson, Secretary of the Board, dated February 22, 2011, and (b) the letter from Ms. Segal to Louise Roseman, Director, the Board's Division of Reserve Payment Operations and Payment Systems, dated April 19, 2011.

Such a result is not only contrary to Congress' purpose in enacting Section 920(b)(1), but also contrary to the purpose of the EFTA. Section 904 of the EFTA requires the Board to consider the costs and benefits to financial institutions and consumers of any regulation promulgated pursuant to the EFTA. 15 U.S.C. § 1693b(a)(2) (2011). "To the extent practicable," the Board is required to "demonstrate that the consumer protections of the proposed regulations outweigh the compliance costs imposed upon consumers and financial institutions." *Id.* § 1693b(a)(3). We think that it is unlikely that the Board could demonstrate that the application of Section 920(b)(1) to Closed Loop Networks provides benefits to consumers that outweigh the costs to the Closed Loop Networks and ultimately consumers. In fact, as detailed above, the opposite is true.

This basic point – that Section 920(b)(1) was not intended to apply to Closed Loop Networks – is reinforced by a consideration of the context and purpose of enactment of Section 920(b)(1). Congress' general purpose in enacting Section 920(b) was to promote competition and prohibit anti-competitive conduct in the routing of electronic debit transactions. *See* 156 Cong. Rec. S3,625 (2010) (purpose of prior version of Section 920(b) is to "limit payment card networks from imposing anti-competitive restrictions on small businesses and other entities that accept payment cards.").

The specific context for Congress' enactment of Section 920(b)(1) appears to have been Open Loop Networks' imposition of an increasing number of contractual restrictions on the ability of banks and merchants to route PIN-debit transactions over the network of their choice. Unlike transactions involving prepaid cards issued by a Closed

Loop Network, transactions involving PIN-debit cards could be routed over any PIN-enabled payment card network. Banks and merchants could choose to route the transactions over the network that offered the best price. In the 1990s, however, the Open Loop Networks began restricting *by contract* the ability of banks and merchants to route transactions over the network of their choice. *See* L. Constantine, *et al.*, *Practitioner Note: Repairing the Failed Debit Card Market*, 2 N.Y.U. J. L. & Bus. 147, 180 (2005). The technical ability to route transactions over any PIN-enabled network remained, but the choice was affirmatively taken away by contract. This is the issue that Congress apparently sought to remedy in enacting Section 920(b)(1). *See* 156 Cong. Reg. S3,704 (2010) (earlier version of Section 920 "stops Visa and MasterCard from imposing any competitive restrictions").

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If you have questions or require further information, please do not hesitate to contact Rodge Cohen at (212) 558-3534 or Virgil Mattingly at (202) 956-7028.

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