By Electronic Delivery to regs.comments@federalreserve.gov

July 23, 2021

Ann E. Misback
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue NW
Washington, DC 20551

Re: Docket No. R-1748: *Debit Interchange Fees and Routing* (RIN 7100-AG15)

Ladies and Gentlemen:

This letter is submitted by Visa Inc., on behalf of itself and its affiliates ("Visa"), to the Board of Governors of the Federal Reserve System (the "Board") in response to the Board's proposed rule to amend Regulation II to clarify that its network exclusivity restrictions apply to card-not-present transactions and make other related changes (the "Proposal").[1] Visa appreciates the opportunity to provide comments on the Proposal.

Trust is the cornerstone of Visa's business and our brand. Trust is also the foundation of the electronic payment system, giving consumers and businesses the confidence to conduct commerce and move money securely, reliably, and efficiently across geographies and time zones knowing their financial information is protected. Recognizing this, Visa believes that significant regulatory changes should only be undertaken with the goals of enhancing integrity, trust, and confidence in the payment system and/or addressing significant market failure, with careful consideration of the impact on all stakeholders. We believe the Board's Proposal addresses neither. Specifically, Visa has three principal concerns with the Proposal:

First, Visa appreciates the Board's interest in clarifying the application of Regulation II's network exclusivity provisions to card-not-present transactions in light of technological and marketplace changes since the adoption of Regulation II. However, as the Board acknowledges in the Proposal, technologies for supporting such transactions on historically PIN-based debit networks are, relatively speaking, new and unproven, and therefore have not been widely deployed or supported by issuers, PIN networks, merchants, or other participants in a debit transaction.[2] For this reason, we believe that those aspects of the Proposal that would deem card-not-present transactions to be a "specific type of transaction" for purposes of the two network requirements are premature and would introduce confusion and uncertainty about issuer obligations rather than clarity. We also believe that these aspects of the Proposal could undermine the safety and efficacy of the payments system by requiring issuers to enable

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[1] *See* Federal Reserve System, Debit Card Interchange Fees and Routing, 86 Fed. Reg. 26189 (May 13, 2021), *available at* https://www.govinfo.gov/content/pkg/FR-2021-05-13/pdf/2021-10013.pdf (last visited July 16, 2021).

[2] *Id.* at 26191 and n.17.

additional routing choices that are not yet fully mature in terms of fraud prevention, risk management, and customer experience. We note that the Board has stated that it is not seeking to create substantial or new obligations in the marketplace, yet, for the reasons stated below, its Proposal would do just that. We believe a better approach would be to continue to allow market practices around card-not-present transaction processing to continue to evolve in ways that reflect and address fraud and other risks, the relative maturity of different payments technology options, and competition among issuers, networks, acquirers, and merchants. As prior experience with the evolution and maturation of card-present transactions has demonstrated, and as discussed in more detail below, the market is fully capable of continuing to develop and implement solutions over time that support multiple networks over which merchants can choose to route card-not-present transactions.[3] We therefore urge the Board not to move forward with its proposal to deem card-not-present transactions as a "specific type of transaction" for purposes of Regulation II.

Second, we are concerned that specific language in the Proposal intended to clarify the inclusion of card-not-present would inadvertently do much more than that and instead fundamentally and substantively *change* the role of issuers by imposing a new requirement that they ensure that there are two networks enabled for every geographic area, every merchant, every type of merchant, and every particular type of transaction. Such an approach poses numerous practical and legal problems, and is not supported by the administrative and factual record. As a practical matter, it would not be operationally feasible. As a legal matter, an affirmative requirement that issuers ensure that there are at least two unaffiliated payment networks available for every transaction would go well beyond the text of the Durbin Amendment, which only prohibits an issuer from imposing restrictions on the availability of electronic debit networks. This aspect of the Proposal could also be interpreted to undermine the issuer's good faith discretion in deciding which transactions to process and force them to accept transactions regardless of risk. We do not believe that the Board intended such a far-reaching result, and thus suggest that, at a minimum, the Board not finalize this aspect of the Proposal.

Third, we are concerned that the Proposal would replace Regulation II's current term "form factor" with the new term "means of access." While the commentary suggests that "means of access" is a term that better aligns with industry terminology, the proposed language fails to define that important term. Instead, the Proposal provides potential examples of "means of access" using additional broad and undefined terms, including "information" stored inside an e-wallet or other device. Without further definition, however, the new proposed language will create confusion regarding the circumstances where a multiple network requirement is intended to apply (a "means of access") versus information or other potential components of authentication, thereby undermining or resulting in a potential inconsistency with the existing rule that issuers need not enable two networks for each means of authentication. We do not believe that was the Board's intention in proposing this new language. Further, although the Proposal characterizes this change as a clarification, without further definition or limits to this commentary, these changes potentially expand the scope of Regulation II's two network

[3] Indeed, as the Proposal acknowledges, "[i]n the decade since the adoption of Regulation II, technology has evolved to address [barriers to card-not-present solutions], and more networks have introduced capabilities to process card-not-present transactions." *See id.* at 26190.

requirement in a way that restricts the introduction of new technologies unless they were first available on two separate networks, and would accordingly have the effect of deterring innovation in the processing of authorizations for debit card payment transactions. We therefore urge the Board to provide further definition that clarifies this term by (i) limiting "means of access" subject to the two network requirement to hardware and/or software necessary to enable the transaction to be routed to a network, and (ii) expressly excluding from that term additional features that are more properly viewed as components of authentication.

This letter is organized as follows:

- Part I describes why the Board should not move forward with its proposal to clarify that card-not-present transactions are a "particular type of transaction" for purposes of Regulation II.
- Part II describes why aspects of the Proposal intended to clarify the role of the issuer would not be operationally feasible, are inconsistent with the Electronic Funds Transfer Act (the "EFTA"), and would result in significant unintended consequences.
- Part III describes why the use of the term "means of access" without further clarifying definition would create confusion with respect to issuer obligations, restrict the introduction of new technologies, and deter innovation in the processing of authorizations for debit card payment transactions.

I. The Proposal's "clarification" that card-not-present transactions are a "particular type of transaction" for purposes of Regulation II should be withdrawn as it is premature, unnecessary, and likely to cause confusion and uncertainty about risk and fraud management in the marketplace.

As the Board notes in the Proposal, among some or all historically PIN-based debit networks, the ability to support card-not-present transactions is relatively new and untested in the marketplace. The Proposal also recognizes that issuers have been increasingly enabling such transactions—although not as rapidly or as comprehensively as the Board might have expected.

Any time a new technology or capability is introduced, broader ecosystem enablement cannot occur overnight. The party introducing the new capability must convince all stakeholders of the robustness, security, and reliability of its solution, and those stakeholders must themselves make system and infrastructure changes necessary to support that solution, which may be considerable. This process of convincing the ecosystem to implement the solution must be repeated over and over again to make sure that each participant potentially involved in processing the transaction puts in the investment and development work to enable the new capability. That is, each network's value proposition must work for both issuers (to incent them to enable the network) and merchants (to incent them to accept the network), taking into account economics, network capabilities, risk and fraud, liability shift, and dispute rules, among other considerations. It is therefore not sufficient for any one participant to unilaterally introduce a solution to make that capability universally available. Indeed, the fact that PINless debit has yet to be widely adopted in card-not-present transactions does not reflect a market failure or inadequacies in issuer compliance with the EFTA or Regulation II. Rather, it likely reflects a

combination of factors, including that networks (i) have not sufficiently developed their PINless debit technology and associated fraud, risk (including stand-in capabilities), and dispute (chargeback) services, (ii) are not providing sufficient incentives for issuers to participate in PINless debit and incur the costs to enable it, and/or (iii) are not sufficiently incenting acquirer processors or merchants to participate and enable the functionality.[4] In addition, even where a network may do some of these things, PINless debit may introduce new risks and/or otherwise not provide a compelling business case to issuers as they mature their relevant technology stack.

Visa's introduction of signature debit in the 1990s similarly required Visa to go issuer by issuer to convince them to add signature debit functionality to their existing then-PIN only debit cards. At the time Visa was offering added functionality that did not previously exist and was not being offered by most other networks. Even so, millions of debit cards remained PIN-only into the early 2000s and thus incapable of being used as E-commerce and other card-not-present channels grew. It is therefore not at all surprising, and is certainly not suggestive of a market failure, that PINless debit's adoption by the industry has been gradual.

Nevertheless, over time, as the historically PIN-based debit networks have made the case for the ecosystem—from the merchants to the processors to the issuers—to support PINless solutions in card-not-present environments, there *has* been increased uptake and volume growth in PINless debit card-not-present transactions. As prior experience in the card-present environment has demonstrated, there is no reason to believe that the market will not continue to develop and implement solutions that support multiple networks over which merchants can choose to route card-not-present transactions, ultimately achieving broad and widespread support at a pace consistent with safe and responsible technological innovation and growing market demand. Given that, Visa believes that this aspect of the Board's Proposal is not necessary to the enablement of PINless debit.

We also believe that, as a practical matter, this aspect of the Proposal, coupled with the provisions addressing issuer obligations, could be harmful to a range of payments system participants, including small merchants who may not control their routing decisions, by either forcing issuers to adopt potentially risky or ill-advised technologies or transactions (*e.g.*, large ticket card-not-present transactions), or forcing issuers to disable existing support for transactions where only one option meets their risk, fraud, and other appropriate standards because transactions would otherwise only be supported on a single network (*e.g.*, transit). Simply put, the Board should permit the market to continue to work to broaden network support for card-not-present transactions unless and until there is some clear evidence of market failure that would require direct regulatory intervention, which presently does not exist. Rather than disrupt the market with a new and unnecessary regulatory mandate, we believe the much better approach is for the Board to allow the relevant technologies to more fully mature, thereby permitting market forces, further technological developments, and time to address any perceived lack of routing choice in the card-not-present environment.

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[4] Additional factors, as suggested further below, could include: (i) merchants simply might not feel they need such options; (ii) the functionality offered might not match the needs of specific types of merchants or processing models; or (iii) the network rules might not provide appropriate dispute, liability, or other provisions governing the transactions to meet the various (and sometimes competing) needs of ecosystem participants.

II. Those aspects of the Proposal intended to clarify the role of the issuer would not be operationally feasible, are inconsistent with the EFTA, and would result in significant unintended consequences.

A. The language in the Proposal that is intended to clarify the role of the issuer under Regulation II is overreaching, and would instead fundamentally change and expand the issuer's role.

The Proposal would amend the operative language of Regulation II's network exclusivity provisions, 12 CFR § 235.7(a)(2), the stated purpose of which is to "reflect the role of the issuer in ensuring that the enumerated capabilities of networks are, in fact, enabled." The Proposal notes that this change is "not intend[ed] . . . as a substantive change . . . but rather as a clarification of the existing language."[5] Notwithstanding that intent, in function, these proposed textual changes to § 235.7 would go well beyond mere "clarification," and would instead convert the existing requirement to allow, or enable, two networks on a debit card transaction into a new mandate that two unaffiliated networks be available to every merchant and for every particular type of transaction. Moreover, issuers would potentially need to monitor these network determinations on an ongoing basis given the fluidity and dynamic nature of retail payments.

For context, section 920(b) of the EFTA directs the Board to issue rules prohibiting an issuer or payment card network from "restrict[ing] the number of payment card networks on which an electronic debit transaction may be processed" to less than two unaffiliated networks.[6] The existing regulatory text of 12 CFR § 235.7(a), which implements that directive, makes clear that the obligation on the issuer is limited to *allowing* transactions to be processed on two unaffiliated networks:

> "An issuer satisfies the requirements of paragraph (a)(1) of this section only if ***the issuer allows an electronic debit transaction to be processed on at least two unaffiliated payment card networks, each of which does not, by rule or policy, restrict the operation of the network to a limited geographic area, specific merchant, or particular type of merchant or transaction***, and each of which has taken steps reasonably designed to enable the network to process the electronic debit transactions that the network would reasonably expect will be routed to it, based on expected transaction volume" (emphasis added).

The Proposal does not describe any reason to believe that this current language or the obligations it creates, as implemented across many thousands of industry participants over the past ten years, are unclear to, or have been subject to misinterpretation by, any party. Nor does it identify any potential confusion over the role of the issuer in meeting these obligations.

In contrast, the proposed regulatory text would transform language that, to date, has been properly understood as a prohibition on issuers restricting payment card networks (or

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[5] 86 Fed. Reg. 26189 at 26192.

[6] *See* EFTA § 920(b)(1) (12 U.S.C. § 1693o-2(b)(1)).

participating in networks with certain restrictive practices) into an affirmative, positive mandate than an issuer must now meet:

> "An issuer satisfies the requirements of paragraph (a)(1) of this section only if, ***for every geographic area, specific merchant, particular type of merchant, and particular type of transaction for which the issuer's debit card can be used to process an electronic debit transaction, such issuer enables at least two unaffiliated payment card networks to process an electronic debit transaction***, and where each of these networks has taken steps reasonably designed to be able to process the electronic debit transactions that it would reasonably expect will be routed to it, based on expected transaction volume" (emphasis added).[7]

The wording of this proposed amendment would produce a significant conceptual shift. First, it would not be sufficient under the proposed language for the issuer to participate in a second debit network that did not, by rule or policy, restrict its operation impermissibly as the current regulation would permit. Thus, despite the fact that the issuer's contractual privity is only with the network—not the myriad of acquirers in such network or the merchants that sign up with an acquirer to accept that network's debit cards—the issuer's obligation could be read to require each issuer to effectively guarantee to the end-user merchants the operational availability of two unaffiliated routing choices for any conceivable transaction. Second, the proposed language would extend such obligation to "every geographic area, specific merchant, particular type of merchant, and particular type of transaction for which the issuer's debit card can be used [on any enabled debit network] to process an electronic debit transaction."[8] That shift would not merely "clarify the responsibility of the debit card issuer,"[9] but instead would entail consequences that reach far beyond enabling two networks for card-not-present transactions. Importantly, it would transform the statutory purpose of the Durbin Amendment—to prohibit issuers from "restricting" or imposing undue constraints on merchants' routing options—into a requirement imposing upon issuers vicarious liability for acts or omissions by other parties, should there not be absolute parity in the acceptance and routing availability of their two debit networks in every circumstance.

In addition, and despite the Proposal's clearly stated objective of "clarify[ing] the applicability of the regulation's prohibition on network exclusivity to card-not-present transactions,"[10] the proposed amendments to § 235.7 are not limited to card-not-present transactions alone, but would alter the role of the issuer more generally, including with respect to card-present transactions. Yet there is no reason to believe, and the Proposal presents no evidence showing, that the current language in § 235.7 has been generally ineffective. Indeed, this language has accomplished its objectives in the context of the card-present environment, as the past decade has shown. Thus, to the extent the Board has concerns with issuer behavior in

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7 *Id.* at 26194.

8 *Id.*

9 *Id.* at 26190.

10 *Id.* at 26192.

the card-not-present context, it should enact changes narrowly tailored to that perceived problem, rather than alter rule text that is otherwise clearly understood and working as intended.

Finally, we note that the sweeping consequences of the proposed amendments to § 235.7 are also inconsistent with the characterization of the Proposal in the accompanying staff memorandum, which again emphasizes the Proposal's extension of Regulation II's network exclusivity provisions to card-not-present transactions as a mere "clarification" of the regulation's applicability.[11] This characterization suggests the Board did not intend to propose regulatory text with such uncertainty and far-reaching impacts. As we describe below, those impacts can be avoided through significantly more targeted revisions to Regulation II that, while still achieving the Board's stated goals, would avoid the potential legal and practical problems with the Proposal described in this letter.

B. The Proposal is not operationally feasible as a practical matter given how the industry operates today, as no issuer is able to guarantee that a merchant has two or more routing options available in every conceivable context.

The proposed regulatory language is fundamentally flawed in that it would compel issuers and networks to do that which cannot be done. Requiring either issuers or networks to effectively guarantee that every merchant will have two routing options in every conceivable context is not operationally feasible, as issuers in four-party networks have limited visibility into—and no control over—which networks any particular merchant chooses to accept, or which transactions all other parties that are involved in the transaction decide to enable on an end-to-end basis. Moreover, the dynamic nature of the payments system means that particular routing choices that an issuer may permit and enable on a debit card may not be available or feasible in certain common contexts.[12]

There are a range of reasons that a particular merchant's routing choices may be limited that are outside of an issuer's control. A primary example of this is the fact that some PIN-based debit networks do not support all transaction sizes for PINless transactions or operate in all card-not-present segments in order to limit fraud exposure, and the characteristics of transactions that are supported by PIN-based debit networks is likely to continuously evolve. Similarly, as the following examples demonstrate, other limits on merchant routing choice may be the result of (i) the decisions of other parties to the transaction, such as payments service providers and

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[11] Staff Board Memo, *Proposed Amendments to Regulation II (Debit Card Interchange Fees and Routing) to Clarify the Prohibition on Network Exclusivity; Biennial Report on 2019 Interchange Fee Revenue, Covered Issuer Costs, and Covered Issuer and Merchant Fraud Losses Related to Debit Card Transactions* (April 30, 2021), *available at* https://www.federalreserve.gov/newsevents/pressreleases/files/bcreg20210507a2.pdf (last visited July 16, 2021).

[12] The Board noted that the volume of card-not-present transactions processed over single-message networks remains low, despite adoption of innovations to support conducting of such transactions by single-message networks. *See id.* at 26191. However, it is important to highlight that even if issuers enabled two unaffiliated networks for card-not-present transactions, any increase in the volume of card-not-present transactions processed over single-message networks is dependent on a number of factors and other participants, as explained below.

platforms, or merchants themselves, and/or (ii) operational constraints specific to a merchant, merchant segment, or payments environment, including the capabilities of the network itself.

1. *Payment service providers and platforms*

There are millions of businesses that obtain payments services from third-party service providers and platforms, such as payment aggregators, payment facilitators, point-of-sale ("POS") solutions, etc.[13] These businesses are choosing to accept those networks enabled by the payment service provider/platform they select, which may be more limited than the full universe of networks the issuer has chosen to enable on the customer's debit card.[14] For example, some of these payment aggregators (and other payment service providers) do not offer PIN-based acceptance of debit cards at POS locations in the U.S. due to market dynamics, including factors like speed of enablement, pricing, ease of use and functionality, and the additional costs of hardware and testing, that reflect the commercial preferences of the small- or medium-sized merchants. Ultimately, businesses can choose which payment service provider/platform (and thus which networks that provider/platform has enabled) to work with, based on their needs.

Issuers not only lack the visibility to be able to identify the millions of individual small and micro businesses served by different payment aggregators, service providers, or e-commerce platforms and marketplaces in the card-not-present space, but they have no means of determining the payment card network acceptance options made available to *every* such business. These various models of merchant servicing may also evolve in unforeseen ways that the issuer has no role in, based on technology offerings and merchant needs. Even though it is the decision of these other third parties that restrict routing choice in such cases, the proposed statutory text of the Proposal appears to nonetheless impose responsibility on the issuer for those decisions if they resulted in less than two routing choices for every individual merchant.

2. *Commercial terms of merchant agreements*

Longstanding merchant business agreements, partnerships, and franchise relationships also may limit, or otherwise dictate, which payment card networks are accepted at individual merchants. For example, some merchants limit the networks that its individual locations may accept, and only revisit network acceptance decisions when negotiating commercial agreements at the corporate-entity level. Thus, to navigate this and similar arrangements, the Proposal would appear to require issuers to continuously monitor and update its processes whenever any individual merchant changes the payment card network(s) it accepts. Simply put, that is not possible or feasible in any manner.

Similarly, in a range of franchise arrangements, the payment card networks accepted by any individual location may vary based on the decision of the respective franchisee. The Proposal would appear to require issuers to determine and monitor payment card network

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13 *See* Square, *The payment platform designed to save you time and money*, *available at* https://squareup.com/us/en/payments/payment-platform (last visited July 16, 2021).

14 Moreover, the issuer has no effective way of comparing these providers and platforms for compliance purposes (nor should it be responsible to do so).

acceptance variations across franchises (or other corporate structures) to ensure compliance with the Proposal, which would not be operationally feasible.

3. *Limiting payments environments*

There are a range of segment-specific payment environments that require processing capabilities that are only available from a subset of payment card networks, and cannot be made more widely available on all debit networks absent significant additional development, integration, or potential reissuance of the physical card. Such limiting payment environments may include:

- Transactions for which the final amount of the payment is unknown and/or incremental (*e.g.*, restaurant or delivery-app with tipping, lodging extension, vehicle rental);
- Payments that are aggregated with other transactions (*e.g.*, multiple rides in a day are aggregated for clearing and settlement purposes);
- Transactions that occur in traditional "offline" environments (*e.g.*, airline cabin sales, transit);
- Payments where the underlying goods within a single order are shipped at different times after authorization (*e.g.*, e-commerce delayed shipments); and
- Health spending transactions (*e.g.*, flexible spending account transactions) that use point-of-sale transaction qualification or substantiation systems, such as the Inventory Information Approval System ("IIAS"), to verify the eligibility of goods or services in connection with health care and employee benefit accounts in accordance with Internal Revenue Service rules.

Similarly, certain payment environments prioritize speed and throughput (*e.g.*, transit fare gates), and thus the use of multiple routing options may be neither feasible nor desirable in those environments. Here again, the Proposal would appear to make issuers and networks liable or otherwise responsible if and when merchants choosing to enable payments in these environments or business models are subject to such operational constraints.[15] One can also readily imagine new payment technology enhancements in the future that require operational capabilities that are available only on one network. The proposed language would inadvertently create confusion as to whether issuers could enable that enhancement for merchants before multiple networks offer the same technology to ensure multiple routing options are available for merchant users of that technology.

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[15] For example, we understand that the IIAS system is only enabled for PIN-based transactions at a very limited number of merchants today.

4. *Other operational constraints*

Network acceptance by merchants may also be limited by the merchant's own operational considerations. For example, merchants may limit network acceptance and routing decisions based on the incremental merchant cost entailed in supporting, testing, and integrating a new network (*e.g.*, hardware and compliance costs to support PIN pads or enable contactless readers). Merchants also have incentives to primarily accept networks that are more prevalent within the same geographic footprint. Even where a particular debit network does not restrict its geographic scope, it also may not extend its sales and enablement efforts to the smallest merchants in the most remote locations.[16] These factors alone are likely to cause many merchants to make network acceptance decisions that result in only one routing choice for some transactions in certain circumstances, such that it is not possible for issuers to ensure that two routing choices are available in *every* circumstance. This is especially likely to be the case for *small merchants*, which have greater reason to make limiting acceptance choices, as well as *small issuers*, whose cardholders are more likely to transact in footprints limited in geography or other salient factors. As a result, some smaller networks may also be unable to grow their geographic acceptance footprint, which in turn would make them less attractive for acceptance by a merchant or enablement by an issuer.

C. The Proposal's overbroad approach to revising Regulation II is inconsistent with the plain language of the EFTA.

The plain language of section 920(b)(1)(A) of the EFTA requires the Board to prescribe regulations that prohibit issuers and payment card networks from *restricting* the number of payment card networks on which an electronic debit transaction may be processed "by contract, requirement, condition, penalty, or otherwise" to a single network or to less than two unaffiliated networks. Importantly, nothing in the statutory text authorizes the Board to prescribe regulations that impose an *affirmative* obligation on issuers or payment card networks to ensure that two unaffiliated networks are enabled to route debit card transactions for *every* merchant and particular type of transaction.

Consistent with the statute, and as we describe above, an issuer would not be able to effectively guarantee that a merchant can, in every conceivable context, have two or more routing options given the complex nature of the payments ecosystem and the very broad range of situations in which a specific transaction might not be able to be processed, including where fraud risk is elevated.

Particularly in a four-party payment system, the issuer's obligation not to restrict the number of payment networks on which an electronic debit transaction may be processed can reasonably only apply to actions under the issuer's control (*e.g.*, enabling an appropriate second network, issuing a card or other "form factor" that can be used to support routing choice among the networks). The issuer cannot ensure that numerous third parties, including merchants, undertake the technical, commercial, or other steps that might be needed to exercise a routing

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[16] For example, Shazam operates primarily in the Midwest, Presto! only operates in Publix Supermarkets in the Southeast, and ATH primarily operates in Puerto Rico and U.S. Virgin Islands.

choice based on that device.[17] A multitude of parties, such as payment aggregators, digital wallet providers, and others, often interpose themselves between what the issuer can control—issuing a debit card or other "form factor"—and what a particular end merchant might enable.

The Proposal's amendments to § 235.7 would substantially deviate from the EFTA's statutory language. While it may be possible that the statutory reference to issuer practices that "restrict" the number of payment card networks on which an electronic debit transaction may be processed is susceptible to different interpretations, no reasonable interpretation of that language would transform the statutory prohibition on restrictive practices into a positive mandate of merchant routing choice that issuers must effectively guarantee, as the Proposal would appear to do.

D. The Proposal's overbroad language creates ambiguity as to whether issuers and networks may effectively implement fraud prevention and risk management measures in the context of particular transactions without running afoul of Regulation II's network exclusivity provisions.

By amending § 235.7 in ways that appear to require that an issuer "ensure" that a merchant has at least two routing options in every circumstance, we are concerned that the Proposal would create new ambiguity as to whether an issuer retains discretion to decide not to process a transaction that is routed to it—such as where the issuer has good faith concerns about an unaffiliated network's fraud prevention or security capabilities or concerns regarding a particular transaction—as this could be viewed as failing to "enable" two routing choices for that transaction. Such a result would clearly run counter to fundamental risk management principles, including preserving an issuer's ability to mitigate fraud by prohibiting specific transactions (*e.g.*, high-risk merchant categories), classes of transactions, etc., including when such transactions are processed in new environments. It would also be inconsistent with the spirit and text of the Durbin Amendment itself, which clearly recognizes the importance of fraud prevention as a public policy goal in the context of its interchange provisions, as well as the Board's own Regulation II, which enables issuers to obtain an additional one-cent fraud prevention adjustment.

Indeed, many merchants make payment card network acceptance and routing decisions based on their own risk assessment of those networks' security procedures, degree of liability, operating performance, and governance policies; after all, they are a primary beneficiary of strong issuer and network fraud prevention and risk management practices. These risk management practices are in place because, among other reasons, fraud rates between networks may differ, even among PIN-based debit networks. Although fraud management is a significant objective for all merchants, mitigating the costs and impacts of fraud is especially critical for small merchants.

The Proposal would introduce uncertainty as to whether issuers and networks must effectively ignore these important and legitimate fraud considerations in order to comply with

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[17] For example, during the initial transition to EMV chip cards, some card transactions failed to be processed when some payment terminals were programmed to route debit transactions to certain debit networks because merchants and their acquirers had not done the necessary implementation work to accept and process those transactions.

the revised regulation, and instead ensure at least two routing choices for *every* transaction, even where doing so would be unwise and imprudent. And if the revised regulation does produce that result, issuers and networks will be forced to prioritize lower cost over security and innovation, creating a race to the bottom that harms consumers, merchants, and issuers with reduced transparency, control, and security, and undermines the integrity of the payments ecosystem. It might even result in the contraction of payment card acceptance options or a slowing of merchant acceptance expansion, if each issuer and each network is effectively forced to only operate in environments and to support transactions where *every* debit network is able to safely and effectively operate.

E. If the Board nonetheless decides to adopt explicit language to address card-not-present transactions, at a minimum the proposed language should be revised in a way that is narrowly tailored to extending network exclusivity requirements to card-not-present transactions.

Should the Board nevertheless move forward with its proposal to deem card-not-present transactions as a "particular type of transaction" for purposes of Regulation II, despite the policy rationales against such a course, we suggest that more targeted and limited changes to the regulation could achieve the Board's stated objectives while avoiding the most significant problems and unintended consequences of the Proposal's overbroad approach. Specifically, the Board should eliminate the proposed changes to § 235.7 that create a new, highly subjective requirement that issuers "ensure" that there are two unaffiliated networks "enabled" for "every" geographic area, merchant, type of merchant, and particular type of transaction, for the reasons described above. Instead, the Board should retain the existing language of 12 CFR § 235.7(a)(2).

To the extent that the Board has specific concerns with the application of Regulation II to card-not-present environments—concerns which, as described in Part I, we believe are unfounded and do not require regulatory change—it should simply clarify how the prohibition on network exclusivity specifically applies to such transactions. Indeed, the Proposal would already provide such clarity through the proposed revisions to Comment 7(a)(2)(iii) specifying that card-not-present transactions are a "particular type of transaction" for purposes of section 235.7(a)(2). Those changes alone are sufficient for the Board to achieve its stated objective.

F. The Board should also affirm that each issuer and/or network may decide, on the basis of its own fraud prevention or risk management policies and procedures, whether to accept specific transactions so long as it makes both card-present and card-not-present routing choices available.

As described above, the Proposal's overbroad amendments to § 235.7 introduces substantial ambiguity as to whether an issuer or network may choose not to accept a specific transaction for good faith fraud prevention or risk management reasons without running afoul of the broadened network exclusivity provisions. Issuers should not be forced to accept, and be responsible for, specific transactions outside of their risk tolerance; doing so would ultimately undermine the integrity and robustness of the payments ecosystem, not enhance it. Indeed, network limits on transaction types and sizes for card-present (and card-not-present) transactions

have been and remain an important consideration of merchants as they assess the networks' risk capabilities and use that assessment to inform their routing choices.

The Board should resolve this ambiguity by making clear in the preamble to the final rule, the text of the final rule, or the commentary, that nothing in 12 CFR § 235.7(a)(2) or Appendix A thereto should be construed as limiting, or imposing any liability or obligation on, an issuer or payment card network that chooses not to accept a particular transaction on the basis of good faith fraud prevention or risk management considerations. This approach would leave open the possibility that issuers and/or networks could continue to decide whether to authorize a specific transaction based on its risk profile (*e.g.*, based on dollar amount, merchant segment, length of time the account has been open, etc.). Specifically, the Board should confirm that any requirement that an issuer "enable" at least two routing options does not supersede or eliminate the issuer's ability or discretion to make a good faith determination as to whether to accept or decline an individual or class of transaction that is routed to it.

G. The Proposal should be revised to clarify that issuers are not responsible for decisions by other parties involved in the transaction that impose their own restrictions or limitations on a particular transaction.

By effectively requiring that issuers guarantee that merchants have two routing choices for every transaction, the Proposal's overbroad approach appears to make issuers responsible for the actions or decisions by others not to enable or make two unaffiliated networks available for a specific transaction. For example, some networks have established a dollar amount limit for PINless transactions that are routed to them—the issuer should not be held responsible for this decision.[18] To address this concern, the Board should make clear, either in the preamble to the final rule or in the final rule or commentary text, that neither issuers nor payment card networks are responsible under Regulation II (including the network exclusivity prohibitions thereof) for decisions by any merchant or any other unaffiliated party to a particular transaction to restrict or limit acceptance or routing of that transaction for any reason. This change would reflect the fundamental fact that there are significant limits on what issuers and networks can do to facilitate routing choice, as a number of factors outside their control may ultimately determine the routing choices available in any particular case.[19]

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[18] Nor should an issuer be found to be noncompliant with the Durbin Amendment by selecting a network that adopts risk-tailored limits on PINless transactions as a risk management measure.

[19] We note that the Proposal itself acknowledges this, stating that "[t]he network used to process a transaction may . . . depend on [factors other than issuer enablement], such as whether the merchant can support the authentication methods used by the available networks. It may also depend on the cardholder's choice of authentication method in situations where the merchant has configured its card terminal to enable cardholder choice." *See* 86 Fed. Reg. 26189 at 26190-91, n.11.

III. Unless clarified, the Proposal's use of the undefined term "means of access" would create confusion with respect to issuer obligations, be inconsistent with the Board's acknowledgment that issuers are not required to enable two networks for each authentication method, restrict the introduction of new technologies, and deter innovation in the processing of authorizations for debit card payment transactions.

The Proposal would make significant changes to Comment 7(a)7, which currently states that the network exclusivity requirements apply "regardless of whether the debit card is issued in card form." The current Comment uses the term "form factor" to describe the scope of the regulation's application, which appears to contemplate a physical card, hardware, software, or some combination thereof that is provided by the issuer to its cardholder to enable its cardholder to initiate transactions over a debit card network. Under the Proposal, the term "form factor" would instead be replaced with the term "means of access." "Means of access," however, is not defined; instead, the Proposal lists examples of a "means of access" that include "information stored inside an e-wallet on a mobile phone or other device, or another means of access that may be developed in the future."[20]

The Federal Register notice characterizes the proposed changes as a clarification of the two network rule to align its terminology with industry terminology, capture recent technological changes, and "future proof" the regulation to encompass "means of access" that do not yet exist. Instead of serving as merely a "clarification," the Proposal would create ambiguity that would significantly expand the scope of the two network requirement in § 235.7(a)(2) as it exists in the current regulation, and goes far beyond what would be required to support the application of the two network requirement to the core issue being addressed by the Board's Proposal, ensuring that the routing of card-not-present transactions is not "restricted."

First, the Proposal does not include any substantive definition of "means of access" but instead provides only a non-exhaustive list of examples of what such a "means of access" *could be* in broad and potentially limitless terms that are also not defined—including "information stored . . . on a mobile phone" and "another means of access that may be developed in the future."[21] As a result, and as we illustrate through some examples below, the language of the proposed Comment provides no principled basis that issuers and networks can use to distinguish between when an element of a payment transaction must be considered a "means of access" (where two networks will be required) or information or other technology that supports a particular method of cardholder authentication (where they are not). Unless revised, the proposed language would create confusion and an inherent tension with the position—two networks are not required for each authentication method—that the Board has explicitly stated in Regulation II, defended in litigation,[22] and reiterates elsewhere in this Proposal.

Second, by creating ambiguity as to where the scope of the term "means of access" ends and where authentication information or technology begins, this change in terminology would

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[20] *Id.* at 26195.

[21] *Id.* at 26192-26193.

[22] *See NACS v. Board of Governors of the Federal Reserve System,* 746 F.3d 474 (D.C. Cir. 2014), *cert. denied*, 135 S.Ct. 1170 (2015).

potentially expand the two network requirement to any new payment technologies, authentication methods, and other value-added services that networks may develop, even where that technology is not required to process a debit transaction. Unless revised, therefore, we believe the Board's proposal will introduce needless uncertainty around the application of the two network requirement, undermine the Board's own position that the two network requirement does not apply to methods of authentication, and deter innovation in new technologies.

To illustrate the uncertainty that the Proposal is likely to introduce, take, for example, a one-time passcode provided to a cardholder by an issuer by means of a network service that facilitates better authentication of a card-not-present transaction—under the expansive language of the Proposal, the passcode may be viewed as a "means of access," and therefore could not be enabled by the issuer if that technology may be proprietary to a single network. Similarly, a network or technology solution provider could develop a biometrics identification service that uses a customer's palm print to provide additional assurance that the person initiating a card transaction is in fact the cardholder. Under the Board's unbounded "means of access" proposal, it is unclear whether such a service could be introduced unless and until at least two networks (and indeed potentially every network) could support the service, even if a participating merchant wishes to offer the service to provide a better payment experience for their customers and notwithstanding that a cardholder could still make a payment using their physical payment card.[23]

Existing regulatory guidance highlights the confusion created by the proposed commentary, and rebuts the Board's suggestion that the phrase "means of access" is clearly understood industry terminology. This guidance has recognized the inherent complexity and overlap of concepts such as authentication, "form factors," and security elements. For example, the Federal Financial Institutions Examination Council ("FFIEC") guidance on authenticating E-Banking customers covers—as components of "authentication"—both physical devices such as smart cards as well as non-physical technologies or security elements such as one-time passwords, biometrics, and PINs. Additionally, the Consumer Financial Protection Bureau's Regulation E, which implements other provisions of the EFTA, defines "access device" as a "card, code, or other means of access," which includes debit cards, PINs, and payment codes.[24] The existing regulation's use of the term "form factor" creates a distinction, albeit an artificial one, between physical devices and non-physical means of authentication that has enabled the industry over the past ten years to largely distinguish between potential components of authentication that might be subject to the two network requirement. In contrast, the proposed shift to "means of access," and incorporation of any "information" that may be stored on a phone or other device or an as-yet unknown "[other] means of access," eliminates this more limiting language and leaves the meaning of "means of access" open-ended, and in practical effect,

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[23] The biometric service provides a mechanism for a seamless and frictionless interaction at the POS, and would enable payment to occur without any need for a card, phone, wearable, or other consumer device as long as the consumer can be recognized, with their linked payment credentials retrieved from the cloud to make the payment. *See* CNBC, *Amazon is bringing palm-scanning payment system to Whole Foods stores*, April 21, 2021, *available at* https://www.cnbc.com/2021/04/21/amazon-whole-foods-getting-palm-scanning-payment-system.html (last visited July 16, 2021).

[24] *See* 12 CFR § 1005.2(a) and associated commentary.

indistinguishable from the other components that are more properly recognized as means of authentication. Given the repeated acknowledgement by the Board that two networks are not required for each method of authentication, we do not believe this result was the Board's intention in the Proposal.

If the Board maintains its current proposal of using the key term "means of access" without limits or adequate definition, networks will have little or no incentive to develop new authentication technologies that may be considered to be "means of access" as they may not be able to deploy them uniquely; rather they might be required to wait until other networks have invested in developing and implementing similar technologies, if ever. Removing—or even impairing the clarity under the regulation of—networks' ability to compete in security technology would severely limit the development of network and transaction security and fraud prevention for debit card payment systems. We note for context that the same impediments would not apply to other payment systems. Banks seeking more secure payments as technology evolves would have strong incentives to encourage their customers to use non-debit payment systems that could offer proprietary security or authentication solutions that could not be used by debit networks, and which might provide a competitive advantage to those other payment services, including FedNow.[25]

In order to provide greater clarity on the coverage of Comment 7(a)7, we believe that the Board should maintain its clarification that any "means of access" covered by the two network requirement must in the first instance be provided to the cardholder by the issuer financial institution. This would help ensure that issuers are not held responsible for "means of access" that are independently provided by third parties. In addition, the Board should further clarify that the "means of access" requiring two networks refers only to the hardware and/or software necessary to enable a transaction to be authorized or routed to another network, but does not include ancillary features that are more properly viewed as components of authentication or enhanced security elements not necessary for transaction processing.[26] For example, it should be permissible for a network to make available additional data fields or information about a transaction that is uniquely available on its system (*e.g.*, how or where the transaction was originated, and by whom, fraud or risk scoring, etc.) to give an issuer or acquirer more confidence about the validity of the transaction. Such information may increase the effectiveness

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[25] The Federal Reserve should not use its regulatory authority to disadvantage private sector payment systems or their participants compared to Federal Reserve payment services without carefully considering the costs and benefits and determining whether the Proposal's objectives can be reasonably achieved with a lesser or no adverse competitive impact. *See* Board, The Federal Reserve in the Payments System (Revised 2001), *available at* https://www.federalreserve.gov/paymentsystems/pfs_frpaysys.htm (last visited July 16, 2021) ("The Federal Reserve recognizes its responsibilities to cooperate with other providers in improving the payments system and . . . to maintain a fundamental commitment to competitive fairness"); Board, Federal Reserve System Guidelines for the Provision of Financial Services (1981), *available at* https://www.federalreserve.gov/paymentsystems/pfs_guidelines.htm (last visited July 16, 2021) ("The Federal Reserve System will continue to encourage innovation across the range of financial services").

[26] Such a distinction is consistent with the "access device" concept found elsewhere in Regulation E, which refers to "means of access" that "may be used to initiate electronic fund transfers," appropriately distinguishing between what is required in order to originate or route a transaction to a network versus authentication and security measures that may provide greater assurance of the validity of the consumer or transaction.

or security of the transaction processed on that network but is clearly not required for the transaction to be processed over another network. As a consequence, the issuer can meet its two network requirement by providing its cardholder with a "means of access" comprising the hardware or software sufficient to enable routing on a second debit network.

Separately, the Board should make clear in regulatory text or commentary that additional enhancements or authentication technologies should not also be considered independent "means of access." Without such clarification, as illustrated by the examples above, the proposed commentary regarding "means of access" would confusingly expand the two network requirement into specific *methods* of authentication, rather than the baseline *means* of enabling routing, and discourage innovation and investment in new authentication and security-enhancing technologies.

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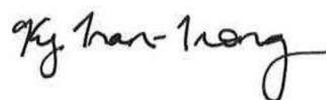
For the reasons stated above, we believe that there is little need for the Board to move forward with its proposal to explicitly address card-not-present transactions under Regulation II given the continuing evolution of market practices for processing these transactions and continuing competition among issuers, networks, acquirers, and merchants in this area. Should the Board nevertheless feel compelled to do so, we urge it to take a more targeted and limited approach that avoids imposing subjective requirements on issuers that are dependent on factors outside their control and that would undermine the payments ecosystem's ability to continue to responsibly manage fraud and other risks.

We would be happy to follow up with you on any aspects of this letter with further supporting information or submissions. If you have any questions concerning the issues raised in this letter, do not hesitate to contact me at 202-419-4109 or ktrantro@visa.com.

Sincerely,



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