



UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

August 11, 2021

Ann E. Misback
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, N.W.
Washington, D.C. 20551

Re: Docket No. R-1748, RIN 7100-AG15, Debit Card Interchange Fees and Routing

Dear Ms. Misback:

The staffs of the Federal Trade Commission's ("FTC") Bureau of Competition, Bureau of Economics, and Bureau of Consumer Protection¹ (collectively, "FTC staff") appreciate the opportunity to provide comments to the Board of Governors of the Federal Reserve System ("Board") regarding the Board's proposed clarification of Regulation II, which implements section 920 of the Electronic Fund Transfer Act ("EFTA"). As part of the Dodd-Frank Wall Street Reform Act of 2010, Congress amended EFTA to add section 920, which promotes competition between debit card networks for merchant business by requiring debit card issuers to enable at least two such networks for a merchant to choose between for electronic debit transactions.²

The FTC is a bipartisan agency with a dual mission to protect consumers and promote competition. The FTC promotes competition principally through enforcement of the antitrust laws and advocacy. In addition to its enforcement of the antitrust laws and other statutes, the

¹ This letter expresses the views of staff in the Federal Trade Commission's Bureau of Competition, Bureau of Economics, and Bureau of Consumer Protection. The letter does not necessarily represent the views of the Federal Trade Commission or of any individual Commissioner. The Commission, however, has authorized us to submit these comments.

² See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 § 1075 (July 21, 2010) (codified at 15 U.S.C. § 1693o-2(b)). Section 920 also directed the Board to regulate interchange collected by non-exempt debit issuers, which is not addressed in this comment.

FTC is responsible for enforcing section 920 and Regulation II with respect to certain entities, including debit card networks.³

In the ten years since Regulation II was promulgated, the debit card industry has seen significant growth in the volume of transactions, the prevalence of ecommerce, and the use of new technologies. FTC staff applauds the Board’s proposed clarification, which addresses some issuers’ failure to fully recognize that card-not-present (“CNP”) transactions are a “type of transaction” under the existing Regulation II. FTC staff submits this comment both to endorse the proposed clarification and to suggest additional revisions that will strengthen the rule.⁴ In particular, the Board should adopt revisions that ensure that debit card networks do not create incentives for issuers to evade Regulation II’s clear mandate that there be two unaffiliated networks available for each type of debit transaction, with each network a commercially reasonable alternative for merchants. We urge the Board to prohibit debit card networks from paying incentives to an issuer based on how electronic debit transactions are routed by merchants using that issuer’s debit cards.

I. BACKGROUND

A. The Requirements of EFTA § 920

Congress, through passage of EFTA § 920, sought to increase competition among debit card networks for merchant business in two ways. First, it prohibited exclusivity arrangements between debit card issuers and debit card networks, mandating that at least two unaffiliated networks be available to merchants for debit transactions.⁵ Second, it prohibited both issuers and networks from directly or indirectly “inhibit[ing]” a merchant’s ability to choose between the issuer-enabled networks.⁶ Taken together, these provisions set out a regime in which issuers and networks are required to provide merchants with uninhibited routing choice for debit transactions.

³ See 15 U.S.C. § 1693o(c); 12 C.F.R. § 235.9(c).

⁴ The Department of Justice, which has experience enforcing the antitrust laws in debit markets, likewise suggests in its comment that the Board consider additional ways of strengthening Regulation II to ensure the competitiveness of those markets.

⁵ See 15 U.S.C. § 1693o-2(b)(1)(A).

⁶ 15 U.S.C. § 1693o-2(b)(1)(B).

Congress entrusted rulemaking authority to the Board to implement these provisions. By providing the Board with rulemaking authority, Congress intended that the anti-exclusivity rules could be adapted to changes in the industry.⁷ Congress delegated enforcement of the Board’s rule to several different agencies. For banks, the relevant enforcer is “the appropriate Federal banking agency” under 12 U.S.C. § 1813(q), while for federal credit unions the enforcer is the Administrator of the National Credit Union Administration.⁸ The FTC enforces EFTA section 920 with respect to any entity not specified in 15 U.S.C. § 1693o(a), including debit card networks.⁹ Violations of EFTA section 920 are treated as violations of the FTC Act.¹⁰ The FTC may use its existing investigative and law enforcement powers to address these violations.

B. The FTC’s Enforcement of EFTA § 920

Since the passage of EFTA section 920 and the promulgation of Regulation II, the FTC has investigated potential violations of applicable rules and developed thereby significant expertise relevant to the Board’s current rulemaking.

In 2016, for example, the FTC investigated potential violations of Regulation II relating to restrictions on new terminals capable of reading debit cards with an EMV chip.¹¹ Visa network rules required merchants to present a screen that asked consumers to select the network to process the transaction, without explaining what the consumer was choosing or how the consumer’s choice might make the transaction more expensive to process.¹² In practice, these consumer selection screens prevented merchants from routing transactions to the network of their

⁷ See, e.g., Brief of Amicus Curiae United States Senator Richard J. Durbin in Support of Plaintiffs-Appellees at *26, *NACS v. Board of Governors of the Federal Reserve System*, 2013 WL 6115708 (D.C. Cir. Nov. 20, 2013) (No. 13-5270), (“Statutory language is limited in its ability to keep pace with potentially fast-moving technological developments in the debit card system. It is for that reason that EFTA § 920(b)(1) confers rulemaking discretion upon the Board on how best to guide us through a non-exclusive world.”); see also *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 157 (2000) (citing *Motor Vehicle Mfrs. Ass’n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 103 (1983); *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007) (in the context of a different grant of rulemaking authority noting that “[t]he broad language of [the statute] reflects an intentional effort to confer the flexibility necessary to forestall . . . obsolescence.”).

⁸ 15 U.S.C. § 1693o; 12 C.F.R. § 235.9(a).

⁹ See 15 U.S.C. § 1693o(c); 12 C.F.R. § 235.9(c).

¹⁰ EFTA § 920 is enforced under previously-existing EFTA § 918, codified at 15 U.S.C. § 1693o.

¹¹ See Letter from James W. Frost (FTC) to Julie B. Rottenberg (Visa) (Nov. 22, 2016), https://www.ftc.gov/system/files/documents/closing_letters/nid/closing_letter_from_james_frost_to_visa_-_11-22-16.pdf.

¹² See CUToday, “Visa No Longer Steering Debit Transactions Its Way,” (Nov. 22, 2016), <https://www.cutoday.info/Fresh-Today/Visa-No-Longer-Steering-Debit-Transactions-Its-Way>.

choice.¹³ The FTC investigated this Visa rule as a potential inhibition of merchant routing choice in violation of Regulation II.¹⁴ In response to the FTC’s investigation and concurrent guidance issued by Board staff, Visa revised its rules so that merchants were no longer required to display these selection screens to customers.¹⁵ Board staff’s guidance stated that a network rule mandating that the merchant present the consumer with a selection screen violates Regulation II “because it prevents the merchant from directing the routing of electronic debit transactions.”¹⁶

Although FTC and Board staff action led to a change in Visa’s rule, many merchants had already purchased payment terminals programmed to transfer routing choice away from the merchant. Merchants wishing to regain control over routing had to reprogram or replace these terminals, entailing significant business disruption and expense.¹⁷ While some larger merchants promptly reprogrammed their terminals, other merchants were unable to do so.¹⁸ Smaller merchants, in particular, were less likely to incur the cost associated with replacing the terminals.¹⁹ This episode highlights the importance of clear rules that set in advance parameters for acceptable and prohibited conduct.

¹³ See Letter from James W. Frost (FTC) to Julie B. Rottenberg (Visa) (Nov. 22, 2016), https://www.ftc.gov/system/files/documents/closing_letters/nid/closing_letter_from_james_frost_to_visa_-_11-22-16.pdf.

¹⁴ See *id.*

¹⁵ See *id.*; Press Release, Visa, Visa Modifies Policies on Debit Routing (Nov. 22, 2016), <https://investor.visa.com/news/news-details/2016/Visa-Modifies-Policies-on-Debit-Routing/default.aspx>.

¹⁶ Board of Governors of the Federal Reserve System, *Frequently Asked Questions About Regulation II (Debit Card Interchange Fees and Routing)* (added Nov. 2, 2016), <https://www.federalreserve.gov/paymentsystems/regii-faqs.htm>.

¹⁷ See Meeting Between Board and Representatives of PIN Debit Networks, Merchants, Merchant Trade Groups, and Counsel (attaching June 3, 2019 letter from National Retail Federation to FTC) (June 11, 2019), (noting that “replacing or reprogramming terminals is an expensive endeavor, assuming the merchant even knows or understands the issues.”), <https://www.federalreserve.gov/regreform/rr-commpublic/merchant-network-meeting-20190611.pdf>; Complaint ¶ 94, *Kroger v. Visa*, No. 1:16-cv-693-MRB (S.D. Ohio June 27, 2016), ECF No. 1 (describing the “significant costs” associated with reprogramming Kroger’s “tens of thousands of POS terminals”).

¹⁸ See Meeting Between Federal Reserve Board Staff; Representatives of Merchants, Merchant Trade Associations, Debit Networks, a Consumer Association; and their Counsel (attaching survey describing how 7 months after the FTC investigation, many merchants still displayed the consumer choice screen) (Oct. 23, 2017), <https://www.federalreserve.gov/regreform/rr-commpublic/merchants-meeting-20171023.pdf>; Letter from National Retail Federation to FTC at p. 7 n.14 (June 3, 2019) (“[T]here remain [in 2019] a significant number of these terminals [with the application choice screen] in use, particularly at smaller merchants’ locations”); First Data, *A Merchant’s Guide to Maximizing Consumer Experience and Network Routing at POS* at p. 6 (2017), <https://www.firstdata.com/downloads/pdf/FD-Guide-to-Debit-Network-Routing-WP.pdf> (urging merchants to configure the POS terminal to allow for routing, noting that “[m]any large national retailers implemented this best practice more than a year ago.” (emphasis added)).

¹⁹ See Sienna Kossman, *EMV Debit Card Payment Prompts Create Confusion*, Creditcards.com (Jan. 16, 2018) (industry executive describing how “local retailers, such as dry cleaners and mom-and-pop shops . . . have virtually

C. Market Developments After Regulation II

Since 2011, there have been significant changes affecting the debit card industry, including changes in how consumers shop and the use of new technologies.

As the Board recognizes, over the past decade the use of debit cards in the United States has expanded significantly, with the number of debit card payments increasing from 56.5 billion in 2012 to 86.4 billion in 2018.²⁰ CNP debit transactions have seen even higher levels of growth as ecommerce has expanded.²¹ The number of non-prepaid CNP debit transactions nearly tripled between 2012 and 2018: from 5.6 billion to 16.2 billion.²² The consumer shift toward CNP transactions accelerated during the COVID-19 pandemic, as merchants and consumers preferred touchless forms of payment.²³ Even when the consumer is physically present in a store, many transactions are now processed as CNP, such as when items are paid for via an application on a mobile phone.²⁴

Debit cards have also changed, with physical debit cards incorporating new technologies such as chips and contactless features.²⁵ Digital debit cards stored in virtual wallets like Apple Pay and Samsung Pay are increasingly common.²⁶ Many transactions (including those involving virtual wallets) are now processed using “tokens” (encrypted versions of the debit card number)

no ability to change the scripting of the messaging and the way the point-of-sale works” without replacing the terminal), <https://www.creditcards.com/credit-card-news/emv-confusion-debit-card-payment-prompts/>.

²⁰ See Board of Governors of the Federal Reserve System, *2019 Federal Reserve Payments Study*, Table B.1 (Dec. 2019), <https://www.federalreserve.gov/paymentsystems/2019-December-The-Federal-Reserve-Payments-Study.htm> [hereinafter 2019 Fed Payments Study].

²¹ See Proposed Rule, Debit Card Interchange Fees and Routing (“Proposed Rule, Debit Interchange and Routing”), 86 Fed. Reg. 26189, 26190 (May 13, 2021).

²² See 2019 Fed Payments Study, *Detailed Data Release* at tab “Non-Prepaid Debit Card Payments,” <https://www.federalreserve.gov/paymentsystems/fr-payments-study.htm>. This comes in the context of overall growth in the use of debit cards.

²³ See Proposed Rule, Debit Interchange and Routing, 86 Fed. Reg. at 26190; see also Fumiko Hayashi, Federal Reserve Board of Kansas City, *Remote Card Payment Fraud: Trends and Measures Taken in Australia, France, and the United Kingdom* at p. 1. (Nov. 25, 2020), <https://www.kansascityfed.org/research/payments-system-research-briefings/remote-card-payment-fraud/>.

²⁴ See, e.g., National Retail Federation, “Coronavirus leads to more use of contactless credit cards and mobile payments despite cost and security concerns,” (Aug. 6, 2020), <https://nrf.com/media-center/press-releases/coronavirus-leads-more-use-contactless-credit-cards-and-mobile-payments>.

²⁵ See 2019 Fed Payments Study at p. 7 and Figure 6 (showing that between 2015 and 2018, the number of chip-authenticated in-person general-purpose card transactions increased from 1.4 billion to 48.8 billion, and chip authentication now represents more than half of in-person general-purpose card payments).

²⁶ See 2019 Fed Payments Study at p. 7 and Figure 6; Susan Pandey, Ph.D. & Marianne Crowe, Federal Reserve Bank of Boston, *Industry Perspectives on the Evolution of EMV Payment Tokenization*, p. 3–4 (May 6, 2019), <https://www.bostonfed.org/publications/mobile-payments-industry-workgroup/industry-perspectives-on-the-evolution-of-emv-payment-tokenization.aspx>.

for security. Tokens add an additional participant to the transaction process, as they require a token service provider to decrypt and validate the token.²⁷

Networks have developed new features, and many of the networks that in 2011 processed only single-message PIN transactions now offer PINless and dual message features.²⁸ With these new features, these networks are now capable of processing CNP transactions.²⁹ However, as the Board has observed, the volume of CNP transactions processed over networks other than Visa and Mastercard remains low, because “issuers have not consistently enabled” historically single message networks (referred to below as “alternative networks”) for CNP transactions.³⁰ The practical result is “only one network...being available to process card-not-present transactions.”³¹ FTC staff agrees with the Board that this situation is “inconsistent” with the provisions of EFTA § 920 and Regulation II.³²

D. Payment Card Networks Compensate Issuers Based on the Share or Volume of Debit Transactions that Merchants Route over their Network

Some debit card networks have used contract terms that incentivize an issuer to influence how transactions are routed among the enabled networks.³³ These terms can be structured as incentive payments, rebates, or discounts provided to the issuer and tied to the number, dollar volume, or percentage share of transactions routed to the network providing the incentive, which we collectively refer to here as “routing-based incentives.” For example, a network might pay an

²⁷ See Pandya & Crowe, *supra* note 26 at p. 11.

²⁸ See Proposed Rule, Debit Interchange and Routing, 86 Fed. Reg. at 26191 and n.15 (“transactions over single-message networks may no longer require PIN authentication” and “some traditionally single-message networks can use two messages to authorize and clear some transactions.”).

²⁹ See *id.* at 26191 (“Data on network activity collected by the Board confirm that nearly all single-message debit card networks conducted card-not-present transactions in 2019.”).

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 26191–92.

³³ See Final Rule, Debit Card Interchange Fees and Routing (“Final Rule, Debit Interchange and Routing”) 76 Fed. Reg. 43394, 43441 (July 20, 2011) (“[I]ssuers may receive incentive payments upon reaching or exceeding debit card transaction, percentage share, or dollar volume threshold amounts.”); see also *See Complaint* at ¶ 49, *United States v. Visa Inc.*, 3:20-cv-07810 (N.D. Cal. Nov. 5, 2020), <https://www.justice.gov/opa/press-release/file/1334726/download> (“Visa has inhibited the adoption of alternative lower-cost networks for online debit by disincentivizing banks from enabling the use of alternative debit networks.”); National Retail Federation, *Visa’s and Mastercard’s Continuing Violations of the Durbin Amendment*, p. 16 (June 3, 2019), <https://www.federalreserve.gov/regreform/tr-commpublic/merchant-network-meeting-20190611.pdf> (“Visa and Mastercard each offer financial incentives to issuers that agree to process a pre-set volume of the issuer’s debit transactions through their networks.”).

issuer if a specified dollar volume or percentage share of transactions has been routed to the network. Or, the network might pay an issuer if the issuer increases the dollar volume of transactions routed to the network from year to year.

Issuers that wish to receive these network-provided incentive payments have limited means to ensure that they meet the percentage share or volume thresholds set out in their contracts, as the merchant is supposed to control the routing decision. The principal action an issuer can take to increase the likelihood that it meets percentage share or volume thresholds set by a particular network is not to enable (or instead to disable) features offered by its other network(s). For example, an issuer can improve its ability to reach volume targets set by the incentive-paying network by disabling CNP transactions for the disfavored network. Such actions eviscerate merchant routing choice.

II. THE BOARD’S PROPOSED CLARIFICATION SHOULD BE ADOPTED

Section 920 expressly provides that a merchant must be able to choose between at least two networks when routing an electronic debit transaction.³⁴ The current Regulation II directs issuers to enable at least two networks for each “type of transaction” (among other requirements) so that no group of transactions will be left outside its coverage.³⁵ The Board’s proposal clarifies that CNP transactions are a “type of transaction” that must be supported and enabled for at least two networks to comply with Regulation II.³⁶

“Type of transaction” is not defined in the regulation. Still, the Board’s proposed clarification should surprise no one. In the supplemental information accompanying the publication of the final rule, the Board cited “card-present and card-not-present” transactions as examples of “transaction types.”³⁷

Although FTC staff believes that CNP transactions are a type of transaction under the existing version of Regulation II, as the Board has observed, issuers have not “consistently

³⁴ See 15 U.S.C. § 1693o-2(b)(1)(A).

³⁵ 12 C.F.R. § 235.7(a)(2).

³⁶ Proposed Rule, Debit Interchange and Routing, 86 Fed. Reg. at 26192, 26194 (amending § 235.7 Comment 2.iii).

³⁷ Final Rule, Debit Interchange and Routing, 76 Fed. Reg. at 43435 (discussing the possibility of setting different interchange caps for different types of transactions); *see also id.* at 43434 (noting that network chargeback rules “vary by type of transaction (e.g., card-present and PIN-based).”).

enabled” both networks on their debit cards for CNP transactions.³⁸ Accordingly, the Board’s proposed clarification should help ensure that merchants have at least two viable, unaffiliated networks at their disposal when processing a CNP transaction, consistent with EFTA § 920. FTC staff therefore supports adoption of the Board’s proposal.

III. THE BOARD SHOULD ALSO PROHIBIT ROUTING-BASED INCENTIVES

In its proposal, the Board clarifies an *issuer’s* obligation to enable at least two unaffiliated networks for each type of debit transaction. FTC staff advises that it would also be useful to address debit card *network* practices that have contributed to issuers’ failure to consistently enable two networks for every type of transaction and that could contribute to similar problems in the future. FTC staff recommends that the Board revise 12 C.F.R. § 235.7(a)(3) or its associated commentary to expressly prohibit payment card networks from using routing-based incentives. Such incentives encourage (a) exclusivity for certain types of transactions and (b) inhibition of the merchant’s routing choice. Eliminating routing-based incentive programs will make it less likely that issuers will search for ways to circumvent Regulation II, whether by violating the rule (necessitating an enforcement action) or by finding a loophole (necessitating future revisions to Regulation II).

Incentives tied to the share or volume of transactions actually routed to a network are inconsistent with the statutory scheme. First, the statute expressly prohibits exclusivity.³⁹ Routing-based incentives can lead to *de facto* exclusivity. For example, suppose that all unaffiliated debit networks on an issuer’s card offer the features necessary to permit routing choice for a given type of transaction. When the issuer refuses to enable those features on all but one network—in order to earn routing-based incentives from the favored network—the issuer is granting the favored network exclusivity over a type of transaction. Indeed, as the Board’s current proposal reflects, many issuers have created exclusivity—contrary to the purpose of the statute and Regulation II—over CNP transactions by not enabling a second network for these

³⁸ Proposed Rule, Debit Interchange and Routing, 86 Fed. Reg. at 26191. Some issuers have enabled a subset of their cards to process card-not-present transaction over single-message networks, while others preclude this option entirely. *See id.*

³⁹ *See* 15 U.S.C. § 1693o-2(b)(1)(A) (“(1) Prohibitions against exclusivity arrangements[:] (A) No exclusive network”).

transactions. Second, the statute prohibits networks and issuers from directly or indirectly inhibiting merchant routing choice.⁴⁰ Even where routing-based incentives do not result in exclusivity, they reward the *issuer* for a choice that should be made by the *merchant*, which the issuer can only influence through some form of inhibition. Because both possible outcomes—exclusivity and routing inhibitions—are barred by the statute, the routing-based incentives that create them should be expressly prohibited.

A prohibition on routing-based incentives would be valuable even assuming that the Board adopts its proposed clarification to issuers' enablement obligations. Certainly, it is desirable for the Board to identify and prohibit specific mechanisms that are used to circumvent Regulation II. But it is more effective to eliminate or substantially reduce issuers' incentives to interfere with merchants' ability to route transactions to alternative networks. When Regulation II was adopted, the Board chose not to specifically address routing-based incentives because it believed issuers would have "limited ability to control" how transactions would be routed once mandatory "issuer or payment card network priorities" were prohibited.⁴¹ Since then, however, these incentives have remained in use and many issuers have retained exclusivity for certain types of transactions, such as CNP. Permitting routing-based incentives to continue enables networks to encourage issuers to circumvent the statute and Regulation II using novel approaches in the future. As the experience with CNP transactions has demonstrated, it is difficult to predict in advance all the ways that issuers and networks might devise to inhibit merchant routing choice.

While the Board's current proposal focuses on CNP functionality, there are other network features that similarly impact a merchant's ability to route certain types of transactions. These features, like CNP, have been inconsistently enabled by issuers even where available from each network on a card. If routing-based incentives are permitted to continue, issuers will have a financial incentive to restrict disfavored networks going forward, even when those networks have or develop the necessary routing features. For example, a network needs the ability to

⁴⁰ See 15 U.S.C. § 1693o-2(b)(1)(B) ("(1) Prohibitions against exclusivity arrangements: ... (B) No routing restrictions").

⁴¹ Final Rule, Debit Interchange and Routing, 76 Fed. Reg. at 43450.

process dual message transactions where the value of the transaction cannot be known at the time of authorization, such as in dine-in restaurants, hotels, and rental car agencies.⁴² Dual message features are also necessary when a customer buys multiple products from an online merchant that might ship at different times, or when shipment is delayed.⁴³ For transactions that need these features, a network that does not have dual message functionality enabled is not a commercially reasonable routing option as required by Regulation II. Similarly, when a network is enabled to process PIN-authenticated transactions only, that network is not a commercially reasonable option for ecommerce, an environment in which the Board has recognized that PIN authentication is not in commercial use.⁴⁴ Networks should not be able to use routing-based incentives to secure exclusive enablement of these features and the associated types of transactions.

Features necessary to process debit transactions in varied environments continue to evolve, and the introduction of each new type of transaction creates another opportunity for networks to incentivize issuers to inhibit merchant routing choice through selective enablement of features for the disfavored network. For example, debit transactions are increasingly likely to involve features such as out-of-band authentication, tokens, and other technologies designed to reduce fraud. If an issuer supports these features for only one network, even when multiple networks have developed such features, the issuer has degraded the quality of the unaffiliated network(s) enabled on its debit cards. This type of degradation in quality has significant potential to inhibit merchant routing choice. For example, an issuer's antifraud systems may be more likely to decline transactions that do not use a particular feature, such as out-of-band authentication. If such a feature from an alternative network is available but not enabled on an issuer's debit card because of incentive payments from a primary network, merchants effectively cannot use the alternative network, inhibiting merchant routing choice.

⁴² See Bob Woodbury (FIS), "U.S. Card Networks Set Their Sights on Their Larger Competitors" (Oct. 16, 2018), <https://www.fisglobal.com/en/insights/what-we-think/2018/october/card-payment-network-authentication>.

⁴³ See *id.*

⁴⁴ See Proposed Rule, Debit Interchange and Routing, 86 Fed. Reg. at 26191 n.17 ("[T]he industry has not widely adopted those technologies for PIN entry" for online purchases.).

Issuers are more likely to support and adopt new technologies on both networks if the primary network cannot incentivize them to reduce or halt their development efforts with an alternative network. Moreover, alternative networks will have greater incentives to develop new features if they know issuers are not being paid routing-based incentives to avoid enabling those new features. Restricting enablement of new technologies to only a single network means that merchants will only have one network available for a new type of transaction, and thus networks will not face the competition envisioned by the statute. These problems can be hard to fix after the technology is deployed because systems have already been built and installed. It is far preferable for new technologies that impact debit routing to be designed to enable routing, and issuers should not be rewarded by networks for supporting designs and systems that make routing difficult.

Of course, the proposed ban on routing-based incentives should be crafted to permit debit networks to compete for issuer business within the statutory scheme, which assures merchants routing choice. As the Board correctly noted in 2011, incentives may be part of that competition. Accordingly, incentives that reward the issuer for enabling the paying network rather than for inhibiting merchant routing choice are unobjectionable.⁴⁵ For example, a debit network could pay incentives that reward an issuer for enabling that network on a larger number of debit cards or on more valuable debit cards (e.g., cards with higher account balances). A debit network could likewise provide incentives to defray the cost of card issuance (encouraging an issuer to switch from a competitor) or to reward issuer marketing efforts (encouraging growth of the issuer's business). These incentives would allow networks to compete for an issuer's business without rewarding that issuer for inhibiting merchant routing choice.

IV. CONCLUSION

The Board's proposed clarification to Regulation II importantly reaffirms the requirement that issuers support the features necessary for their second unaffiliated network to be a viable option in all types of transactions, including card-not-present transactions. Going further and also

⁴⁵ See Final Rule, Debit Interchange and Routing, 76 Fed. Reg. at 43441.

addressing a practice—routing-based incentives—whereby networks reward issuers for creating exclusivity or inhibiting merchant routing choice will reduce the emergence of similar routing hurdles in the future and help ensure new technologies are not selectively supported by issuers to inhibit merchant routing choice.

Respectfully submitted,

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