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August 6, 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, RIN 7100-AG15
NPRM on Debit Card Interchange Fees and Routing**

Dear Ms. Misback:

This letter responds to the request by the Board of Governors of the Federal Reserve System (“Board”) for public comments on the Board’s proposed rule amending the existing staff commentary to Regulation II for purposes of clarifying: (i) “that debit card issuers should enable, and merchants should be able to choose from at least two unaffiliated networks for card-not-present transactions,” and (ii) the “responsibility of the debit card issuer in ensuring that at least two unaffiliated networks have been enabled to comply with the regulation’s prohibition on network exclusivity (the “Proposed Rule”).¹ We appreciate the opportunity to comment on the Proposed Rule and respectfully ask the Board to refrain from taking any actions that would unnecessarily impose substantial, and potentially insurmountable, compliance burdens on payment card issuers.

As an issuer of prepaid debit cards programs on a nationwide scale, Sutton Bank has a compelling interest in addressing the Proposed Rule. To this end, we note that our programs, which are issued under the small issuer exemption to Regulation II, are essential to our ability to serve as a reliable source of small business and agricultural credit in a portion of north central Ohio that the big banks ignore. In its Federal Register comments, the Board asserts that because the proposed amendments would “apply to all issuers regardless of their size, they are unlikely to have an effect upon competition among large and small financial institutions in the provision of electronic fund transfer services.”² That assertion ignores the obvious fact that the respective ability of banks to absorb new costs is not equal, and substantially higher costs for enabling payment card networks

¹ Federal Reserve System, Debit Card Interchange Fees and Routing, 86 Fed. Reg. 26189 (May 13, 2021).

² 86 Fed. Reg. 26193.

would have a disproportionately severe impact on small issuers.³ In addition, the Board notes that it is unable to determine “whether the benefits to consumers [would] exceed the possible costs to financial institutions.”⁴ In this regard, we note the high probability that greater costs for issuers would result in new and higher fees being charged to prepaid card customers, which often include otherwise unbanked persons who currently receive such products for little or no cost.

I. Regulation II and the existing Official Staff Commentary are clear as written regarding applicability to card-not-present transactions

A person unfamiliar with existing Regulation II and its regulatory history might reasonably conclude from reading the Board’s Federal Register discussion of the Proposed Rule that card-not-present transactions are not currently subject to the requirement that two unaffiliated payment card networks must be made available for processing any electronic debit transaction. However, regardless of whether “[a]t the time Regulation II was adopted, for card-not-present transactions, the market had not developed solutions to broadly support multiple networks for each transaction,”⁵ the version of Section 235.7 that the Board adopted in July 2011, which remains the existing rule, together with then new Official Staff Comment 7(a)-7 (Applicability to All Form Factors), left no room for doubt that the two payment card network requirement applied to card-not-present transactions. Specifically, after immediately discussing online customer purchases and payments in which a physical card is not used, and acknowledging that “PIN debit is not generally offered” for such transactions, the Board unequivocally asserted in its final rule preamble that “the network exclusivity provision in Section 235.7(a)(1) is satisfied as long as an electronic debit transaction may be processed on at least two unaffiliated payment card networks.”⁶ Moreover, regarding the possibility that a PIN-based card network might be unavailable, the Board stated that an issuer could alternatively enable two signature-based card networks.⁷ In sum, the network exclusivity requirements of Regulation II are abundantly clear as written with respect to their applicability to card-not-present transactions without further clarification.

Implicit in the Board’s discussion of Section 235.7(a) is that its decision in July 2011 to include card-not-present transactions within the scope of the network exclusivity requirements was misplaced because compliance was not then feasible, and was likely unattainable; i.e., “At the time the Board promulgated Regulation II, for card-not-present transactions, such as online purchases, the market had not developed solutions to broadly support multiple networks over which merchants could choose to route those transactions.”⁸ Unstated in that same discussion is whether issuers that attempted to comply in good faith, but were unable to do so due to network unavailability, complied with Regulation II as a matter of law. In our view, rather than stating that issuers need to start complying in 2021, a full decade after the rule in question was promulgated, the Board should recognize that the card payment networks, and not issuers, ultimately control the ability to process particular types of electronic debit transactions. To this end, as is further

³ *Id.*

⁴ *Id.*

⁵ 86 Fed. Reg. 26191.

⁶ Federal Reserve System, Debit Card Interchange Fees and Routing, 76 Fed. Reg. 43393, 43448 (Jul. 20, 2011).

⁷ *Id.*

⁸ 86 Fed. Reg. 26190.

discussed below, we urge the Board to clarify that an issuer “enables” a card payment network when the issuer configures a debit card such that electronic debit transactions initiated with the card can be processed over that network. This approach would remove impossibility of compliance from the equation for issuers and place accountability for ensuring that transactions can actually be processed where it properly belongs.

II. Clarifying that an issuer “enables” a payment card network when it configures a debit card to permit transactions to be processed over that network would reasonably accomplish the Board’s stated objectives

In its Federal Register discussion of the proposed changes to Section 235.7, the Board notes that it “does not intend these amendments as a substantive change to the section but rather as a clarification of the existing language.”⁹ As currently written, Section 235.7(a)(2) speaks to the obligations of card payment networks in enabling electronic debit transactions, but is silent concerning the obligations of issuers; i.e., an issuer satisfies the prohibition on network exclusivity under Section 235.7(a)(1):

only if the issuer allows an electronic debit transaction to be processed on at least two unaffiliated 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 [network] 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.

We share the deep concern within the card payment industry that the Board’s emphasis in its Federal Register commentary on “the role of the issuer in ensuring that the enumerated capabilities of networks are, in fact, enabled [emphasis added]”¹⁰ signals a desire to make issuers effective guarantors of merchants’ operational ability to process each and every electronic debit transaction over two unaffiliated routing choices. Such responsibility would be impossible to satisfy. A number of factors, almost all of which are outside of Sutton Bank’s control, create conditions where a merchant will be unable to access one or more of the networks we have enabled. In addition to the above-noted technology constraints at the networks level, a merchant may choose to be equipped to accept and process transactions using only one of the two networks we have enabled. As the Board noted in its July 2011 Federal Register discussion of the then new existing regulation, “[t]o the extent a merchant has chosen not to accept PIN debit, the merchant and not the issuer or the payment card network, has restricted the available choices for routing an electronic debit transaction. . .”¹¹ Moreover, because issuers have no control over which network specific merchants choose to process through, and has no means of knowing what a given merchant will or will not accept, the Proposed Rule could be construed as requiring issuers to add every U.S. debit network to every issued debit card to ensure compliance – which is plainly impossible.

⁹ 86 Fed. Reg. 26192.

¹⁰ *Id.*

¹¹ 76 Fed. Reg. 43448.

Ann E. Misback
August 6, 2021
Page 4 of 4

Instead of repeating the same mistake made in 2011, when the Board adopted issuer requirements for card-not-present transactions that could not be complied with due to factors outside the issuer's reasonable control, we urge the Board to adopt clear and attainable requirements for issuers. In this regard, we suggest that the Board's suggested clarification of the term "enabled" for the purpose of reflecting the "fact that the issuer is the entity that configures a debit card such that electronic transactions initiated with that card can be processed over a particular payment card network" presents that opportunity.¹² Namely, the Board should clarify in Section 235.7 and Official Staff Commentary that "an issuer satisfies its obligation to enable a payment card network when it configures a debit card so as to permit electronic transactions to be processed over that network." Such language would achieve the Board's stated desire to reinforce and clarify the role of issuers in ensuring that networks are, in fact, enabled, without giving creating insurmountable compliance burdens that if adopted, would severely disadvantage small issuers and likely lead to higher costs for consumers.

Thank you for your careful consideration of this letter. In weighing our comments, we ask the Board to consider the potential impacts of its proposals on small issuers, which occupy a special and important niche in the payment card marketplace, as well as the risk of imposing higher costs on consumers of prepaid card products, many of which have no other access to banking services. Please feel free to call or email me if you have any questions regarding the above.

Sincerely yours,



Mark T. Dabertin
General Counsel and Chief Compliance Officer

Cc: J. Anthony Gorrell, Chief Executive Officer, Sutton Bank

¹² 86 Fed. Reg. 26192.