

United States Senate
WASHINGTON, DC 20510-1304

August 11, 2021

Ms. 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

Dear Ms. Misback:

As primary author of Section 1075 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (commonly known as the “Durbin Amendment”), I respectfully submit the following comments in response to the May 13, 2021 notice of proposed rulemaking (“NPRM”) published by the Board of Governors of the Federal Reserve System (“Board”) in the Federal Register (86 Fed. Reg. 26189 et seq.) to clarify the applicability of the Durbin Amendment’s prohibition on network exclusivity arrangements to card-not-present transactions.

I support the Board’s proposed revisions to § 235.7 of Regulation II and associated commentary to further make clear that card issuers must ensure that at least two unaffiliated payment card networks have been enabled for debit transactions, including card-not-present debit transactions. As the Board rightly notes in its NPRM,

A failure by an issuer to enable at least one single-message network for card-not-present transactions, combined with the common industry approach of only enabling one dual-message network on each card, results in only one network—the dual-message network—being available to process card-not-present transactions. In this situation, merchants do not have routing choice for such transactions. The Board views these practices by issuers with respect to card-not-present transactions as inconsistent with Regulation II because they restrict the number of payment card networks on which card-not-present transactions can be processed to fewer than two unaffiliated networks.

On July 24, 2020, I, along with Representative Peter Welch, wrote Chairman Powell to highlight reports that major debit card issuers were refusing to enable PINless debit functionality on their cards for card-not-present transactions, leaving these transactions with only one network routing option in apparent violation of Regulation II. Data collected by the Board corroborates and confirms these reports; as the NPRM notes, “[a]ccording to responses to the Board’s survey of covered debit card issuers, issuers that accounted for approximately 50 percent of all debit card transactions and approximately 50 percent of all card-not-present debit card transactions did not

conduct *any* card-not-present transactions over single-message networks in 2019.” (emphasis added) My letter noted that efforts such as these to circumvent Regulation II and the Durbin Amendment’s non-exclusivity and routing provisions have had the effect of diminishing competition in the debit network industry and costing American merchants potentially billions in excessive fees. My letter urged the Board to take appropriate policy responses to correct such failures to follow Regulation II, and I view the NPRM’s proposed clarifications as corrective measures that are both appropriate and justified.

Further, the proposed clarifications presented in the Board’s NPRM are consistent with the statutory text and intent of the Durbin Amendment’s non-exclusivity and routing provisions in Section 920(b)(1)(A) and (B) of the Electronic Fund Transfer Act (EFTA). As I pointed out in previous comments I submitted to the Board on February 22, 2011, “What the statute makes clear is that network- or issuer-imposed network exclusivity agreements (as well as network- or issuer-imposed routing restrictions that achieve the same effect) are to be prohibited under the regulations that the Board prescribes when those regulations take effect.” By addressing the de facto network exclusivity arrangements that have developed in the card-not-present space, the Board’s proposed clarifications comport with the Durbin Amendment’s statutory text and advance its intended purposes of ensuring competition and choice in the debit network market.

As the volume of card-not-present debit transactions has increased dramatically in recent years, particularly because of the COVID-19 pandemic, the need has become urgent to address Regulation II noncompliance in the card-not-present transactions. The Board’s proposed clarifications represent an important step in the right direction, and I urge the Board to finalize, implement, and enforce them.

Thank you for the opportunity to submit these comments. Should you need any further information please feel free to contact my office.

Sincerely,



Richard J. Durbin
United States Senator