

Before the Board of Governors of the Federal Reserve System
Washington, D.C.

IN THE MATTER OF:
Debit Card Interchange Fees and Routing
Docket No. R-1748, RIN 7100-AG15

Comments of the United States Department of Justice

I. Introduction

The Board of Governors of the Federal Reserve System (the “Board”) has requested public comment on its proposed rule, *Debit Card Interchange Fees and Routing* (the “Proposal”), as described in its Federal Register Notice.¹

The Department of Justice (“Department”), together with the Federal Trade Commission, is one of the primary U.S. Government agencies responsible for promoting and protecting competition. The Department enforces the federal antitrust laws, the goals of which are to protect economic freedom and opportunity by promoting free and fair competition in the marketplace. Additionally, the Department seeks to promote competition and consumer welfare via comments on rulemakings and legislation, as well as court filings. The Department therefore welcomes the opportunity to share its assessment of the Proposal with the Board.

Competition in free and open markets is a defining feature of America’s economy.² Vigorous competition gives consumers the benefits of lower prices, higher quality goods and services, better access to goods and services, and increased innovation.³ For this reason, promoting a competitive American economy for the benefit of American consumers has been a goal of multiple Administrations.⁴ Consumers of financial services, like all consumers, benefit from competition.

¹ The request for comment on the Proposal was published in the Federal Register on May 13, 2021. Debit Card Interchange Fees and Routing, 86 Fed. Reg. 26,189 (proposed May 13, 2021) (to be codified at 12 C.F.R. pt. 235), <https://www.govinfo.gov/content/pkg/FR-2021-05-13/pdf/2021-10013.pdf> [hereinafter the “Proposal”].

² See, e.g., *N.C. State Bd. of Dental Exam’rs v. Fed. Trade Comm’n*, 574 U.S. 494, 494 (2015) (“Federal antitrust law is a central safeguard for the Nation’s free market structures.”); *Standard Oil Co. v. Fed. Trade Comm’n*, 340 U.S. 231, 248 (1951) (“The heart of our national economic policy long has been faith in the value of competition.”).

³ See, e.g., *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 695 (1978) (noting that the antitrust laws reflect a “legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services. . . . The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain – quality, service, safety, and durability – and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers.”).

⁴ See, e.g., Exec. Order No. 14,036, 86 Fed. Reg. 36,987 (July 9, 2021), <https://www.federalregister.gov/documents/2021/07/14/2021-15069/promoting-competition-in-the-american-economy>; Exec. Order No. 13,725, 81 Fed. Reg. 23,417 (Apr. 20, 2016).

The Board’s Proposal seeks to expand the set of competitive choices for merchants who accept debit for online and other card-not-present (“CNP”) purchases. CNP debit transactions are debit transactions where a consumer pays for goods or services without physically presenting her card—as is the case, for example, for online debit transactions. These transactions are very important to the U.S. economy: debit payment networks processed over \$1 trillion in CNP debit transactions in 2019, and online debit volume is growing rapidly.⁵

Currently, merchants often have only one network option for processing CNP transactions. As the Board’s press release announcing the Proposal explains, “[t]he absence of at least two unaffiliated networks for card-not-present transactions forecloses the ability of merchants to choose between competing networks when routing such transactions, an issue that has become increasingly pronounced because of continued growth in online transactions...”⁶ The Proposal explains that “in light of this issue, the [Board] is proposing changes ... to clarify that debit card issuers should enable, and merchants should be able to choose from, at least two unaffiliated networks for card-not-present transactions.”⁷

The Department shares the Board’s goal of increasing competition in the CNP debit payment segment. Given the importance of this segment, increasing competition for online debit transactions could have a very significant impact on the U.S. economy as a whole. By clarifying that issuing banks must enable two unaffiliated debit payment networks for online or CNP debit transactions, the Board’s Proposal takes an important step that could provide merchants a real choice of networks, which may allow alternative debit networks to grow and compete with entrenched incumbents.

II. Background and Current Regulatory Landscape

Increasing the competitiveness of the debit payment market is particularly important given that competition in the debit market is very limited today. The debit payment market is highly concentrated—over 75% of transactions are processed by two firms, Visa and Mastercard. The online debit payment market is even more concentrated with Visa and Mastercard collectively accounting for over 90%, and Visa alone accounting for approximately 70%. This gives incumbent debit networks a significant amount of leverage when negotiating with merchants over the price charged to merchants for the use of their respective debit networks. Lacking competitive alternatives, merchants must pay higher transaction fees that are passed on to consumers in the price of goods and services.

<https://www.federalregister.gov/documents/2016/04/20/2016-09346/steps-to-increase-competition-and-better-inform-consumers-and-workers-to-support-continued-growth-of>.

⁵ Bd. of the Governors of the Fed. Reserve Sys., 2019 Interchange Fee Revenue, Covered Issuer Costs, and Covered Issuer and Merchant Fraud Losses Related to Debit Card Transactions 25 tbl.2 (May 2021).

⁶ Press Release, Bd. of Governors of the Fed. Reserve Sys., Federal Reserve Board invites public comment on proposed changes to Regulation II regarding network availability for card-not-present debit card transactions and publishes a biennial report containing summary information on debit card transactions in 2019 (May 7, 2021), <https://www.federalreserve.gov/newsevents/pressreleases/bcreg20210507a.htm>.

⁷ Debit Card Interchange Fees and Routing, 86 Fed. Reg. at 26,190.

Section 1075 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Durbin Amendment”) attempted to address this issue by requiring banks that issue debit cards (referred to as “issuers” or “issuing banks”) to offer merchants the option of at least two unaffiliated debit networks. But this requirement has not been applied to CNP transactions because many large issuers have not implemented necessary technological changes to permit debit networks other than Visa and Mastercard to process transactions. As a result, debit networks other than Visa and Mastercard are effectively not an option for merchants for most online or CNP transactions.

III. Department Views on the Proposal

By clarifying that issuers must enable at least two unaffiliated debit networks to process online or CNP debit transactions, the Proposal has the potential to increase competition by lowering one of the many barriers to entry and expansion in this segment. In practice, the Proposal could result in issuers enabling technology that would allow smaller debit networks to process online or CNP debit transactions, which could help merchants reduce their costs and save American consumers money. Accordingly, the Department supports the Proposal.⁸

At the same time, the Department encourages the Board to consider whether there may be ways to further improve upon the Proposal. Specifically, the Board should consider whether the Proposal is drafted broadly enough to capture all CNP transactions. For example, dual message transactions—which may become more prevalent in future years—as well as evolving industry standards on security features for CNP transactions may not be captured by the Proposal.⁹ The Department recommends making clear that the Proposal applies to all CNP transactions in order to increase merchant choice and reduce ambiguity.

In addition, the Board should consider whether—even if the Proposal succeeds in enabling merchant choice for CNP debit transactions—card networks and other industry participants may still seek to circumvent it. For example, merchants have alleged that the card networks have taken steps to limit the impact of the Durbin Amendment’s routing regulations in the past, including through their influence over a standard-setting system for terminal technology and their use of

⁸ The Department notes that the Federal Trade Commission has authority to enforce Regulation II with respect to certain entities, including debit card networks. *See* 15 U.S.C. § 1693o(c); 12 C.F.R. § 235.9(c). The Department therefore defers to the Federal Trade Commission’s assessment of how the Proposal could improve the efficacy of Regulation II from a regulatory perspective, including as expressed in its comment filed on this docket.

⁹ “Dual message” refers to transactions where two separate messages are sent with respect to the payment transaction, the first of which authorizes the applicable transaction for up to an initial amount and the second of which clears the applicable transaction for a final amount. Dual message transactions are common in restaurants, for example, where the initial amount may be less than the final amount due to gratuity.

volume incentives to encourage issuers to refrain from enabling technology that would help smaller debit networks win more volume.¹⁰

Finally, we note that the Proposal is one step among many that could be taken to address the lack of competitiveness in the debit card payment market. For example, the Proposal may not significantly diminish the market power of incumbent debit networks. Issuers may choose to rely on Visa and Mastercard to meet the Proposal's two unaffiliated debit networks requirement rather than selecting a smaller debit network. If this occurs, the Proposal will have a limited effect on opening this segment of the economy to smaller or new debit networks. For these reasons, we encourage the Board to remain open to other regulatory actions that could increase competition for debit payments as it proceeds with the Proposal.

IV. Conclusion

The Department commends the Board's goal of introducing greater competition into the payments sector and supports the Board's proposed clarification. As the rulemaking process progresses, the Department encourages the Board to continue to rely on sound policy and analysis in order to ultimately achieve the Board's goal. The Department will also remain vigilant in its own mission of promoting and protecting competition in the payments sector.

Respectfully submitted,

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¹⁰ See Nat'l Retail Fed'n, Visa's and Mastercard's Continuing Violations of the Durbin Amendment, at 5-8, 16-18 (June 3, 2019), <https://www.federalreserve.gov/regreform/rr-commpublic/merchant-network-meeting-20190611.pdf>.