

Federal Reserve Proposes Changes to Modernize the Durbin Amendment to Prevent Exclusivity in Online Purchases

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Nearly a decade after promulgation of Regulation II — better known as the Durbin Amendment — the Federal Reserve Board proposed changes to modernize the regulation by clarifying that the exclusivity prohibition applies to card-not-present transactions, such as online purchases.

On March 7, the Federal Reserve Board issued a [notice of proposed rulemaking](#) (NPR) requiring debit card issuers to provide at least two unaffiliated networks to process card-not-present debit card transactions. As drafted, the NPR would amend Regulation II (Debit Card Interchange Fees and Routing), promulgated under Section 1075 of the Dodd Frank Wall Street Reform and Consumer Protection Act, which amended the Electronic Funds Transfer Act to add a new Section 920 regarding interchange transaction fees for electronic debit transactions and rules for payment card transactions.

The Durbin Amendment, best known for its cap on interchange fees (the fees that card issuers can charge merchants), also requires card issuers to (1) provide at least two unaffiliated payment card networks to process electronic debit transactions, preventing network exclusivity and (2) prohibits card issuers from inhibiting merchants from directing the routing of an electronic debit transaction over any network that may process that transaction. Together, the prohibition on exclusivity and routing inhibition means merchants processing electronic debit card transactions can choose from at least two unaffiliated payment card networks when processing debit card transactions.

There are two types of payment card networks to process debit card transactions — single-message networks and dual-message networks. Single-message networks, which developed from ATM networks, typically use a single message to authorize and clear a transaction and have traditionally processed transactions authenticated using a cardholder's PIN. Dual-message networks, which developed from credit card systems, typically authorize and clear a transaction through two separate messages and have traditionally processed signature-authenticated transactions. At the time the Durbin Amendment was passed, dual-message networks were primarily used to process card-not-present transactions, such as phone orders and online purchases, while single-message networks had limited ability to process such transactions. As a result, industry practice only enabled one dual-message network for card-not-present transactions, prohibiting merchants from having a choice of payment card network when processing card-not-present transactions. However, since the regulation's initial promulgation, payment card networks have adapted to the changing modes of commerce to allow for single-message networks to process card-not-present transactions.

The Federal Reserve's NPR comes just a week after the North Dakota Retail Association and the North Dakota Petroleum Marketers Association filed a lawsuit in the U.S. District Court in Bismarck, saying the Fed has "failed to properly follow Congress's instructions to ensure that debit-card processing fees are reasonable and proportional to the costs of debit-card transactions." In 2013, retailers won a lawsuit challenging the Federal Reserve's implementation of the cap on swipe fees, however the D.C. District Court of Appeals overturned the decision. All the while, retailers and banks have kept a close eye on Congress and Sen. Durbin (D-IL) who are expected to reignite their battle with new legislation dealing this time with credit card transactions. While draft legislation has been circulated, it remains unclear just how far Durbin's credit interchange reform efforts may go. At a minimum, language addressing credit routing options is expected to be a part of the bill.

The NPR proposes changes to clarify that the card-not-present transactions are a type of transaction that must comply with the exclusivity prohibition, and card issuers must ensure at least two unaffiliated payment card networks are enabled for card-not-present transactions. The clarification in the NPR applies beyond card-not-present transactions, proposing that an issuer will only satisfy the prohibition on network exclusivity if, "for every *particular type of transaction* [emphasis added] (as well as every geographic area, specific merchant, and particular type of merchant) for which the issuer's debit card can be used to process an electronic debit transaction, the *issuer has enabled* at least two unaffiliated payment card networks to process the transaction." The NPR also proposes revisions to standardize and further clarify certain terms and phrases in the official commentary of the regulation.

Comments on the NPR are due 60 days after the date of publication in the *Federal Register*.

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