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Key Elements of the Proposed Credit Card Competition Act

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In June, Sens. Richard Durbin, D-Ill., Roger Marshall, R-Kan., Peter Welch, D-Vt., and J.D. Vance, R-Ohio, introduced the Credit Card Competition Act of 2023, which is a reintroduction of a substantially identical bill introduced in the last Congress.

The bill would amend the Electronic Fund Transfer Act to require the Board of Governors of the Federal Reserve to issue a series of implementing regulations within one year after the date of enactment, each to be effective on the date that is 180 days from the creation of the final version of each set of regulations.

The senators' stated aim, as the name of the bill indicates, is to promote competition in the credit card market through provisions that would affect certain large credit card issuers and payment card networks, and change how credit card transactions may be processed today.

Credit Card Processing Networks

The CCCA's focus is on broadening payment card network access for merchants and increasing competition in connection with processing electronic credit transactions. Credit card transactions typically run over the single network, e.g., Visa, Discover, American Express, or Mastercard, associated with the credit card used to initiate the transaction.

The CCCA would prohibit certain credit card issuing financial institutions, which the bill calls "covered credit card issuers," or payment card networks from restricting the number of payment card networks on which an electronic credit transaction may be processed to:

1. "one such network"; or

2. "two or more such networks, if each such network is owned, controlled, or otherwise operated by affiliated persons or networks affiliated with such issuer, or any such network is identified on the list, to be established and updated" by the board as provided in the CCCA, of payment card networks the processing of electronic credit transactions by which would pose a national security risk to the U.S. or are owned, operated or sponsored by a foreign state entity.

Additionally, the proposed CCCA adds the requirement that the number of payment card networks cannot be restricted to the two largest networks by market share with respect to the number of credit cards issued in the U.S., as determined by the board.

Presuming that such payment networks would initially be MasterCard and Visa, this section seems to provide that limiting the available card payment networks to just those two networks would be impermissible under the CCCA.

In other words, one of the payment networks would have to be other than Visa or Mastercard for credit card transactions for credit cards issued by financial institutions with over $100 billion in assets.

Once the covered credit card issuers add a second credit card network, any merchant accepting a covered credit card issuer's credit cards would get to choose which of the two credit card networks it wishes to use to process their associated credit card transactions.

The idea behind this requirement is to create interchange fee competition that would, the senators believe, ultimately result in lower prices for consumers.

Board Reassessment of Largest Networks

The CCCA provides that the board will make a determination, at least every three years after the effective date of the required regulations, as to whether the two networks it identifies in accordance with the CCCA have changed, as compared to its most recent such determination, and that if they have changed, "clause (i)(III) shall no longer have any force or effect."

It is unclear whether this is intended to remove the restriction entirely should the two identified payment networks change from the initial determination by the board, or more likely, the intention was to have the restriction remain in place, but the identified entities would change going forward based on the determinations by the board.

If the board's review reveals that the two largest credit card networks by number of credit cards issued in the U.S. has changed during the three-year cycle from the most recent prior determination, then the prohibition on using the prior two largest credit card networks would no longer have any force or effect.

For example, if either Visa or Mastercard dropped from one of the top two positions within the first three-year period after the CCCA regulations took effect, a credit card issuer with assets over $100 billion presumably could then issue a credit card using Visa and Mastercard because one of them would no longer be one of the largest credit card networks by the number of credit cards issued in the U.S. at that time.

Certain Issuers Excluded From Coverage

The above restrictions apply only to the "covered card issuers," which are defined under the CCCA as a card issuer that, together with its affiliates, has assets in excess of $100 billion, meaning that only the largest of the credit card issuers are to be affected by this statute.

Therefore, nonqualifying financial institutions could presumably continue to issue credit cards with only one credit card network available to process transactions using such cards.

This affected group is further pared down by an exclusion contained in the CCCA providing that the new restrictions and requirements described above would not apply to a "credit card issued in a 3-party payment system model."

This term refers to a credit card issued by a card issuer that is either the payment card network with respect to the credit card, or under common ownership with the payment card network with respect to the credit card.

This would seem to include card issuer networks such as Discover Financial and American Express, potentially providing such issuers a relative advantage over covered card issuers and payment networks having to contend with these restrictions.

No Routing Restrictions

Under the CCCA, credit card issuers are prohibited from imposing limitations on the routing of electronic credit transactions.

Similar to the existing statute in effect for debit card transaction routing, the CCCA would require the board to prescribe regulations prohibiting a covered card issuer or payment card network from inhibiting the ability of a person who accepts credit cards for payment to direct the routing of the electronic credit transactions for processing over any payment card network who can process the transactions. Not only that, but it would also would prohibit a covered card issuer or payment card network from:

- Requiring "any person who accepts credit cards for payments to exclusively use, for transactions associated with a particular credit card, an authentication, tokenization, or other security technology that cannot be used by all of the payment card networks that may process electronic credit transactions for that particular credit card";
- Inhibiting another payment card network's ability to handle or process electronic credit transactions using an authentication, tokenization[1], or other security technology for such processing; or
- Imposing a "penalty or disadvantage, financial or otherwise, on any person for (1) choosing to direct the routing of an electronic credit transaction over any payment card network on which the electronic credit transaction may be processed, or (2) failing to ensure that a certain number, or aggregate dollar amount, of electronic credit transactions are handled by a particular payment card network."

The Potential Reaction to and Impact of the CCCA

The intention of the CCCA is to encourage price competition in the marketplace — and therefore, it is posited, lower interchange rates — as merchants seek to obtain better deals for the processing of their credit card transactions, by placing restrictions on the current status quo relationships between the largest issuing banks and the payment networks.

Proponents of the CCCA see this as a good way to curb what they perceive as excessive bank profits from interchange by increasing competition among the payment networks, thereby reducing interchange fees to all merchants and by extension, resulting in lower prices for goods and services overall for all consumers.

Public critics opposing this bill often take the position that the desired consumer savings promised when the Durbin Amendment was up for passage with similar restrictions during the Dodd-Frank Act debates — along with some actual pricing limitations — did not seem to materialize in any significant way, and conclude that this bill would simply be more of the same.

Others observe that the increased costs of compliance and loss of interchange revenues to the covered card issuing banks may have unintended consequences, such as a reduction on the ability of such financial institutions to offer free or low-cost banking products, or more directly, to continue to fund the often-lucrative rewards programs that cardholders of such cards enjoy that are typically funded through interchange income received by the issuing banks.

It is also worth noting that passage of the CCCA may require the payment networks and merchants that may have volume incentive agreements in place to revisit and possibly have to renegotiate such agreements to reflect the new realities of the marketplace imposed by the CCCA.

Passage of the CCCA could similarly affect co-branded credit card agreements in place between covered card issuers and commercial entities with material rewards programs, as the economics of these relationships may materially shift as a result of these new requirements over time, in ways that affect the agreements' provisions on revenue sharing and how the rewards programs of such co-brand programs are being supported or funded.

Likelihood of Passage

In July, the banking industry began to rally its army of lobbyists to fight the mounting push for the CCCA from Durbin and Marshall, as well as the retail and merchant industry.

The Electronic Payments Coalition, the advocacy organization uniting the payments industry in opposing the CCCA, the American Bankers Association and the Consumers Banking Association are at the forefront of the fight for the industry.

Bankers and the credit card companies have strengthened their advocacy efforts around "Durbin credit," as CCCA is commonly referred to, since losing the Durbin Amendment fight during the Dodd-Frank Act debate and passage over a decade ago.

They are prepared to fight the consumer cost-savings arguments they have been hearing with statistics, but they face a Congress that has largely turned over since the last interchange fight and just now is experiencing how heated the industry-versus-industry lobbying effort can be.

Durbin and Marshall's summer push of the CCCA led to a few heated days on the Hill this summer when Marshall demanded a vote on CCCA on the Senate floor as an amendment to the annual National Defense Authorization Act.

Durbin and Marshall attempted this at the end of 2022 on the NDAA as well, but this year Marshall threatened to stall NDAA proceedings on the floor if his bill did not receive an amendment vote, but ultimately he backed down from the threat and allowed the NDAA to advance.

The backing down, however, is likely only temporary. The battle between credit card networks and Durbin and Marshall did not even take a break for Congress' August recess.

Visa and Mastercard each announced plans to raise their swipe fees this past month. Durbin and Marshall issued a statement, pointing to the plans to raise fees as an additional tax on small businesses and families.

Bankers and payments companies should prepare for the Senate to have its hand forced for another showdown before the end of the year. The next time, it could mean a floor vote, putting many senators on the record for the first time of the industry fight.

The odds for final passage of the CCCA or its language, though, remain low. Should Durbin and Marshall ever find their way to secure a floor vote for the CCCA as an amendment, find enough votes on the Senate floor, and pass their language — it faces stiffer competition in the House.

Chairman Patrick McHenry, R-N.C., remains a steadfast opponent of credit card interchange amendments and would seek to kill any language on the House floor, or in conference of a bill.

Regardless, fierce lobbying will continue by bankers and merchants in hopes of winning senators and representatives to their respective sides.

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[1] "Tokenization" generally relates to the process by which a cardholder's primary account number is replaced with a different number or "token" to protect the account number during some stages of an account transaction. When a payment network receives the token, they must have the actual account number associated with the token in order to process the transaction. On December 23, 2022, the Federal Trade Commission ordered a large payment network to end the practice of refusing to provide other payment networks with the associated account information they needed to process transactions generated by remote ecommerce debit transactions. https://www.ftc.gov/news-events/news/press-releases/2022/12/ftc-orders-end-illegal-mastercard-business-tactics-requires-it-stop-blocking-competing-debit-card.

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