

DURBIN STICKS TO GUNS, CHOOSES SLURPEES OVER  
CONSUMERS:  
AN OVERVIEW OF THE DURBIN AMENDMENT AND ITS  
POTENTIAL ADVERSE IMPACT ON CONSUMERS

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When the chairmen of the Federal Reserve Board and Federal Deposit Insurance Corporation and the Acting Comptroller of the Currency express doubts about a regulation designed to eliminate seventy percent of a market, and when the queen and spokeswoman of consumer financial protection, Elizabeth Warren, refuses to comment on a financial rule supposedly enacted to protect consumers, one would expect a rational legislator to, at a minimum, delay such a measure until they could properly understand its ramifications.<sup>1</sup> Dick Durbin, the number two democrat in the Senate, refuses to fit that mold. Instead, Durbin, the author of the self-titled “Durbin Amendment” to the Dodd-Frank Act, refuses to reconsider the legislation directing the Federal Reserve to limit debit card interchange fees and threatens to filibuster any bill brought before the Senate that seeks to delay its implementation. Under the guidelines of the amendment, the Fed has proposed setting a maximum fee of twelve cents per transaction, a drastic reduction from the current average of forty-four cents.<sup>2</sup> Rather than heeding the advice of regulators and economists to delay the rule to

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<sup>1</sup>See Victoria McGrane and Robin Sidel, *Banks Find Allies in Debit-Fee Fight*, WALL ST. J., Mar. 23, 2011, <http://online.wsj.com/article/SB10001424052748703410604576216950643420330.html>; Interview by Melissa Francis with Elizabeth Warren, Special Advisor to the President and the U.S. Treasury, CNBC (Mar. 22 2011).

<sup>2</sup> Debit Card Interchange Fees and Routing, 75 Fed. Reg. 81,725, 81,756 (Dec. 28, 2010) (to be codified at 12 C.F.R. pt. 235).

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allow time for a study of its adverse effects on consumers, Durbin has chosen to side with major retailers such as 7-Eleven who stand to reap and internalize the differential in fees.

The Durbin Amendment to the Dodd-Frank Act directs the Federal Reserve Board to issue a rule setting the maximum debit card interchange rates that banks can charge to an amount “reasonable and proportional to the cost incurred by the issuer with respect to the transaction” by April 21, 2011.<sup>3</sup> However, rather than letting the Fed determine what to include in the cost calculation, the amendment only allowed four cost categories (disallowing fraud costs, fixed costs, processing fees, set-up costs, etc.).<sup>4</sup> Citing this as one of the core deficiencies in the legislation, Acting Comptroller of the Currency John Walsh has acknowledged that the law’s narrow view of costs will harm the economy.<sup>5</sup> Additionally, four Federal Reserve economists have said that “calculation of that fee requires knowledge of social costs and benefits that are difficult, if not impossible, to measure accurately.”<sup>6</sup> They note that card use would likely decline,<sup>7</sup> presumably because banks will no longer be able to offer free services to their less-wealthy customers. While describing the fixing of interchange fees as “the most extreme form” of intervention, the Fed economists say that it is not clear that any intervention is necessary and imply that it may be better to do nothing than to fix fees based on a questionable definition of cost.<sup>8</sup> Using the costs enumerated by the Durbin Amendment, the Fed released its proposed rule in December 2010, which was to take effect July 21, 2011 as per the law.<sup>9</sup> The rule would set a maximum interchange fee of twelve cents per transaction, a

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<sup>3</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, sec. 1075, § 920(a), 124 Stat. 1376 (2010).

<sup>4</sup>*Id.*

<sup>5</sup> John Walsh, Acting Comptroller of the Currency, Remarks at the Annual Convention of the Independent Community Bankers of America (Mar. 23, 2011), *available at* <http://www.occ.treas.gov/news-issuances/speeches/2011/pub-speech-2011-31.pdf>.

<sup>6</sup> Robin A. Prager, *Interchange Fees and Payment Card Networks: Economics, Industry Developments, and Policy Issues* 47 (Fed. Res. Bd. Fin. & Econ. Discussion Series and Economics Discussion Series, Working Paper No. 23, 2009), *available at* <http://www.federalreserve.gov/pubs/feds/2009/200923/200923pap.pdf>.

<sup>7</sup>*Id.*

<sup>8</sup>*See id.* at 46–48, 52.

<sup>9</sup> Debit Card Interchange Fees and Routing, 75 Fed. Reg. 81,756 (Dec. 28, 2010) (to be codified at 12 C.F.R. pt. 235).

seventy percent reduction from the average fee charged in 2009 average.<sup>10</sup>

After offering the amendment at the last minute, Durbin garnered support for its passage with promises that the cuts in interchange fees would not affect credit unions and community banks. However, both Fed Chairman Ben Bernanke and Acting Comptroller John Walsh have said that in reality, community banks and credit unions will still face the cuts in fees.<sup>11</sup> While the Durbin Amendment limits application of the fee regulation to firms with over ten billion dollars in assets, all institutions will end up with the same low price. This is because the exempt smaller institutions must compete with the larger non-exempt ones and will be forced to lower their own fees to compete “or lose more business to the banking giants.”<sup>12</sup>

Consumers are already feeling the costs of the proposed rule as banks have begun to increase fees and have ended customer-favorites such as free checking accounts and debit card rewards programs. Ninety-three percent of members of one community bank industry association said that they “would charge their customers for services that are currently offered free because of the . . . Fed rule.”<sup>13</sup> Chase banks in Illinois have already increased ATM fees in anticipation of the law, while other banks have stopped programs that reimburse customers for fees incurred at other banks’ ATMs.<sup>14</sup> Chase and Wells Fargo have terminated enrollment in their rewards programs because of the regulation<sup>15</sup> and other banks are mulling limiting debit-card transactions to small purchases.<sup>16</sup>

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<sup>10</sup> *Id.*

<sup>11</sup> See Ed Roberts, *Delay? Proceed? Congress Debates Interchange's Fate*, CREDIT J., Mar. 21, 2011, [http://www.cujournal.com/issues/15\\_12/delay-proceed-congress-debates-interchanges-fate-1007753-1.html](http://www.cujournal.com/issues/15_12/delay-proceed-congress-debates-interchanges-fate-1007753-1.html); Walsh, *supra* note 5, at 5.

<sup>12</sup> Roberts, *supra* note 11.

<sup>13</sup> Maya J. Randall, *Banks, Retailers to Face Off Over Fed's Debit-Card Rule*, WALL ST. J., Feb. 16, 2011, <http://online.wsj.com/article/SB10001424052748704171004576148801652639530.html>.

<sup>14</sup> Stephanie Shyu, *Banks Increase ATM Fees to Offset Legislative Changes*, SmarTrend, Mar. 17, 2011, <http://www.mysmartrend.com/news-briefs/news-watch/banks-increase-atm-fees-offset-legislative-changes>.

<sup>15</sup> Jenalia Moreno, *Debit cards will get less rewarding*, HOUSTON CHRON., Mar. 21, 2011, <http://www.chron.com/disp/story.mpl/business/7485201.html>; Dakin Campbell, *Wells Fargo Halts Enrollment in Debit-Card Rewards, Citing New U.S. Rules*, BLOOMBERG, Mar. 25, 2011, <http://www.bloomberg.com/news/2011-03-25/wells-fargo-halts-enrollment-in-debit-card-rewards-citing-new-u-s-rules.html>.

<sup>16</sup> Aparajita Saha-Bubna, *Banks May Cap Debit Purchases to Combat New Rules*, WALL ST. J., Mar. 10, 2011, <http://online.wsj.com/article/SB10001424052748704399804576193320313890728.html>.

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While Durbin proclaims that the legislation will benefit consumers by fixing a “broken” debit system,<sup>17</sup> the prospect of that happening seems unlikely. Sheila Bair, Chairman of the FDIC, doubts that merchants would pass on savings to consumers through lower prices.<sup>18</sup> Even some consumer advocacy groups have urged the Fed to withdraw its proposal.<sup>19</sup> The only apparent beneficiary of the rule seems to be the merchants who currently pay the fees, such as major retailers including Walgreens and 7-Eleven (who have spoken out in support of the amendment).<sup>20</sup> While companies have complained that the amount they pay in interchange fees has increased over the past decade, they neglect to consider that these costs result from consumers’ increased preference for debit cards due to their convenience and other benefits over forms of payment such as cash and checks.<sup>21</sup> Professor Kevin Murphy has dispelled the notion of the debit system being “broken,” noting that its displacement of checks and cash shows its success.<sup>22</sup> He also notes that debit networks had financed themselves through fees on retailers rather than consumers because it is more efficient that way. His economic analysis suggests that the Durbin Amendment does more harm than good to consumers and decreases efficiency.<sup>23</sup> If the costs of accepting debit cards exceeded the benefits, then retailers simply would not accept them.

The problems of fixing interchange fees becomes apparent when one

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<sup>17</sup> 157 CONG. REC. S1780 (daily ed. Mar. 17, 2011) (statement of Sen. Dick Durbin).

<sup>18</sup> McGrane, *supra* note 1.

<sup>19</sup> Maya J. Randall, *Bill Would Delay Fed's Debit-Card Fee Rule*, WALL ST. J., Mar. 16, 2011, <http://online.wsj.com/article/SB10001424052748704662604576202882193685332.html>.

<sup>20</sup> See *Understanding the Federal Reserve's Proposed Rule on Interchange Fees: Implications and Consequences of the Durbin Amendment Before the Subcomm. on Fin. Insts. of the H. Comm. on Fin. Insts. and Consumer Credit*, 112th Cong. (statement of David Seltzer, Treasurer of 7-Eleven Inc.), available at <http://financialservices.house.gov/media/pdf/021711seltzer.pdf>.

<sup>21</sup> “*The Wall Street Journal* reported the cycle as follows: as late as 1995, debit card use was minuscule; by 2000, debit transactions were still only a small fraction of credit card transactions; yet, by the end of 2008, Visa debit card volume had overtaken credit card volume by number of transactions . . . Simultaneously, consumers cut back sharply on the use of checks. Total check volume fell five percent per year each year from 2000 to 2006. By 2005, aggregate debit card transaction value exceeded the sum of aggregate cash and check transaction value for retailers.” Amended Complaint for Plaintiff at 18 ¶51, *TCF Nat’l Bank v. Bernanke*, 2011 WL 864074 (D.S.D. Jan. 27, 2011) (No. 4:10-cv-04149-LLP).

<sup>22</sup> Report of Professor Kevin M. Murphy, at 2, *TCF Nat’l Bank v. Bernanke*, 2011 WL 864074 (D.S.D. Feb. 15, 2011) (No. 4:10-cv-04149-LLP).

<sup>23</sup> *Id.*

analogizes the regulation to another industry. What if Congress decided that a Slurpee was too expensive? If a regulator was directed to set a maximum price for Slurpees but was forced by the law to set a price proportional to the cost of the ice involved in one Slurpee, it is hard to see how anyone would benefit. Such a price would clearly fail to take into account the fixed costs of owning and operating a store, the costs involved in employing clerks and keeping the store open, as well as the costs of buying and maintaining a Slurpee-making machine. 7-Eleven would clearly not sit idle and instead would be forced to resort to more opaque and less efficient measures of recuperating its costs. One could easily imagine that it would result to strategies such as charging fees for Slurpee cups and straws. It may decrease the number of stores and Slurpee machines. It might be forced to abandon its twenty-four-hour open-for-business policy. Given these likely adverse consequences, one would be hard-pressed to allow such a regulation to be enforced before taking the opportunity to study its effects.

As a result of the expected harm from and uncertainty regarding debit interchange regulation, Senator Jon Tester and a bipartisan group of congressmen in both houses have introduced bills that delay the implementation of the rule for one to two years to give regulators and professional organizations a chance to study its costs and benefits.<sup>24</sup> However, Senator Durbin has vowed to fight any attempt to delay enactment and has threatened to filibuster any such bill.<sup>25</sup> As of now, as many as ten more lawmakers are needed to get the sixty votes necessary to overcome the filibuster and pass the bill in the Senate.<sup>26</sup> While both the Senate and House bills have been referred to the appropriate committees, none have yet scheduled a hearing. As the April deadline approaches, it is critical that Congress acts now to delay or repeal the measure, and that Senator Durbin puts aside his ego for the sake of American consumers.

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<sup>24</sup> Debit Interchange Fee Study Act of 2011, S. 575, 112th Cong. (2011) (allowing two years for the study); Consumers Payment System Protection Act, H.R. 1081, 112th Cong. (2011) (allowing one year for the study).

<sup>25</sup> Thecla Fabian, *Foes Will Need 60 Senate Votes to Repeal, Delay Durbin Amendment*, *Sen. Durbin Says*, *Banking Daily* (BNA) (Mar. 25, 2011).

<sup>26</sup> See Cheyenne Hopkins, *Bills Introduced That Would Delay Debit-Interchange Restructuring*, *CARDLINE*, Mar. 18, 2011, <http://bit.ly/erCFPX>.