



November 14, 2011

Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, N.W.
Washington, D.C. 20551

Re: Proposed Agency Information Collection Activities; Comment Request: Proposed Regulation II Debit Card Issuer Survey (FR 3064a) and Payment Card Network Survey (FR 3064b)

Dear Ms. Johnson:

This letter is submitted to the Board of Governors of the Federal Reserve System (the "Board") on behalf of Discover Financial Services and PULSE Network LLC (collectively, "we," "us," and "our"). Discover Financial Services is a leading consumer lending company in the United States that offers credit cards and personal and student loans. Discover Financial Services also owns an electronic payments company that operates the Discover Network, a credit card, signature debit card and prepaid card payments network; the PULSE Network, a PIN debit, automated teller machine ("ATM") and electronic funds transfer network; and Diners Club International, a global payments network. The PULSE Network is one of the nation's leading PIN debit/ATM networks, and links cardholders of more than 4,400 financial institutions with point-of-sale terminals and ATMs located throughout the United States. PULSE also operates a global ATM network that provides cash access services to Discover and Diners Club cardholders at more than 805,000 ATMs in more than 85 countries around the world.

The Board is continuing the process of implementing the debit card interchange fee provisions of Section 920(a) of the Electronic Fund Transfer Act ("Section 920(a)").¹ As a part of that process, the Board recently issued for public comment proposed debit card issuer and payment card network surveys that the Board proposes to use to facilitate its ongoing

¹ 15 U.S.C. 1693o-2(a).

implementation and reporting obligations under Section 920(a) and related Federal Reserve Board Regulation II ("Regulation II").² We respectfully submit to the Board this comment letter in response to the Board's request for comment on the proposed Regulation II surveys, including the Debit Card Issuer Survey, FR 3064a (the "Interchange Issuer Survey") and the Payment Card Network Survey, FR 3064b (the "Interchange Network Survey") (each, a "Survey" and collectively, the "Surveys"), published in the Federal Register on September 15, 2011.³ We appreciate the opportunity to comment on the Surveys. We also are a member of the American Bankers Association, the Consumer Bankers Association, and the Financial Services Roundtable which, together with other industry associations, have submitted a separate comment letter (the "Associations' Comment Letter"). We concur with the comments provided in that letter. This letter is intended to provide our comments on specific issues and to provide our point of view on some of the comments provided in the Associations' Comment Letter.

DETAILED COMMENTARY

Section 920(a) provides the Board with the authority to require issuers and payment card networks to provide the Board with information necessary for the Board to carry out its authority under the interchange fee limitation provisions of Section 1075 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Durbin Amendment").⁴ The Board's objective should be to develop final Surveys that allow the Board to carry out its statutory authority without unnecessary burden on those required to complete the Surveys. Accordingly, with regard to the Interchange Network Survey, we strongly encourage the Board to revise the Survey so that it does not unnecessarily burden respondents by requesting information that is not meaningful or useful in light of the Board's authority and stated data collection and reporting objective under Section 920(a) of the Durbin Amendment. Regarding the Interchange Issuer Survey, we request the Board to clarify that issuers that only issue cards on three-party systems are not required to complete the survey.

I. The Interchange Network Survey

The Board should revise the Interchange Network Survey because the Survey seeks certain data that is not necessary to any exercise of the Board's authority under Section 920(a) of the Durbin Amendment and, in some instances, requests information that is proprietary to the responding payment card network. Additionally, the Board has not provided respondents with sufficient time to complete the Interchange Network Survey, nor has the Board justified why payment card networks should be required to complete the Interchange Network Survey every year given that the Board's reporting obligation under Section 920(a) of the Durbin

² Debit Card Interchange Fees and Routing, 12 C.F.R. pt. 235.

³ Proposed Agency Information Collection Activities; Comment Request, 76 Fed. Reg. 57,037 (proposed Sept. 15, 2011)

⁴ Pub. L. 111-203, 2010 H.R. 4173, 111th Cong. (July 15, 2010).

Amendment is biennial and issuers will only respond to the Interchange Issuer Survey every other year.⁵

- a. The Interchange Network Survey Seeks Certain Data That Appears Unnecessary To The Exercise Of The Board's Authority Under Section 920(a) Of The Durbin Amendment And, In Some Instances, Seeks Data That Is Proprietary To The Responding Payment Card Network.**

Under the Durbin Amendment, the Board is authorized to collect information necessary to carry out the provisions of Section 920(a) of the Durbin Amendment and is directed to disclose, at least every two years, such summary or aggregate information about the costs incurred, and interchange transaction fees charged or received, by issuers and payment card networks in connection with the authorization, clearance or settlement of debit transactions as the Board considers appropriate and in the public interest. Thus, the Board has authority to collect information from issuers and payment card networks so long as such information is necessary in connection with the Board's rulemaking authority or reporting obligations with respect to the interchange fee limitation and the related (a) fraud prevention adjustment, (b) exemptions for small issuers, general-use reloadable prepaid cards and government-administered payment programs, and (c) prohibitions on circumvention and evasion. Certain provisions of the Survey, however, seek information that does not appear to be reasonably related to the Board's information collection or reporting authority under Section 920(a). In particular, data requests related to (i) merchant locations, and (ii) pricing and incentives paid to exempt issuers, merchants and acquirers, do not appear to be necessary or appropriate categories of information for the Board to request pursuant to Section 920(a) of the Durbin Amendment. Further, much of this information, if collected through the Surveys, is likely to be misleading and is regarded as highly confidential by payment card networks.

- i. Information relating to the number of merchant locations that accept a network's debit cards is not reasonably related to the Board's information collection or reporting authority and is proprietary information.**

The Board requests that networks report the number of merchant locations in the United States that accept the networks' debit cards (see Section I, question 5 of the Interchange Network Survey). A payment card network's merchant acceptance footprint is not directly related to the Board's exercise of rulemaking authority or information reporting obligations under Section 920(a). Consequently, we request that this question be removed from the Interchange Network Survey.

⁵ We also concur with the Associations' Comment Letter that the Interchange Network Survey should only contain two 2011 measurement periods: before October 1, 2011 and October 1, 2011 through year end. For a more detailed analysis of this point, please see Section V of the Associations' Comment Letter.

Information about the number of merchant locations that accept a network's cards is not relevant to the costs incurred, or the interchange transaction fees charged or received, by issuers and payment card networks in connection with the authorization, clearance or settlement of debit transactions. Moreover, networks may not collect or maintain this information (for example, we do not collect or maintain such data nor do we anticipate that we will be able to report this information with a high degree of accuracy going forward), which could disadvantage networks that are unable to respond to this Survey request to the extent the Board uses reported merchant acceptance information for future decision-making. Further, data regarding a payment card network's merchant acceptance is proprietary and highly confidential, and we are concerned that, given the limited number of network respondents who may provide such information, the Board may not be able to conceal the identity of the payment card network providing the merchant acceptance information if such information is included in public reporting.

For the reasons set forth above, we request that the Board remove this question from the Interchange Network Survey. To the extent the Board concludes that it still desires collection of this type of information, we propose that the Board make responding to this question voluntary and urge that the Board commit to ensuring the anonymity of the responses to this question by committing to only reporting responses in the aggregate and omitting names of responding networks.

- ii. Information requests related to interchange and incentives paid to and/or received from exempt issuers, merchants and acquirers are not reasonably related to the Board's information collection or reporting authority, are likely to yield misleading data, and seek confidential network data.

Regarding the Interchange Issuer Survey, the Associations' Comment Letter makes the point that the Board must ensure that the data collected drives meaningful decision-making and is useful to the Board, Congress, and the marketplace as a whole, and that collecting unnecessary information or information that cannot properly be evaluated when collected in group surveys will be burdensome without meaningful benefit. We concur, and believe that similar pitfalls are evident in the Interchange Network Survey. Throughout Section II of the Interchange Network Survey, the Board requests a variety of information about exempt issuers and exempt transactions, none of which appears reasonably related to the Board's data collection or reporting purposes under Section 920(a) and the receipt of which is likely to be of limited utility and possibly misleading.

For example, while the Board likely can justify requesting information about exempt general-use prepaid cards given the Board's reporting obligations under Section 920(a)(7)(D) (which mandates Board reports to Congress regarding such cards), the Board has no similar tracking or reporting obligations with respect to exempt small issuers, acquirers or merchants. Section 920(a) does not regulate a network's payment of incentives to exempt small issuers,

acquirers or merchants and there is no apparent need for the Board to collect this information pursuant to Section 920(a).⁶ Consequently, requiring payment card networks to report data relating to arrangements with exempt small issuers, acquirers and merchants will burden networks unnecessarily. In addition, without knowing the network's mix of regulated and exempt issuers, any data regarding the breakdown of network incentives paid to exempt small issuers and incentives paid to regulated issuers will, at most, have very limited utility and is likely to be misleading.

Reporting a payment network's proprietary information regarding pricing and incentives paid to exempt small issuers, acquirers and merchants in the aggregate does not substantially mitigate the burden on payment networks and likelihood of generating misleading data. Such incentive payments vary greatly from issuer to issuer, are the results of often lengthy negotiation, and depend heavily on the nature, scope and duration of the relationship between the network and issuer; factors that cannot be accounted for in the survey. Reporting such aggregated data, however, risks undermining the negotiation process and a network's incentive and pricing strategies with individual issuers.

To the extent that the Board is concerned about circumvention or evasion of Regulation II, we agree with the Associations' Comment Letter that enforcement of those provisions, including any information gathering related thereto, is the proper purview of the applicable regulatory agency vested with enforcement authority over the applicable parties to the incentive arrangement. Accordingly, we recommend that the Board not request this information as part of the Interchange Network Survey. If the Board maintains the Interchange Network Survey's requests for incentive payment information to exempt issuers, merchants, and acquirers, then we urge that the Board make responding to such questions voluntary and commit to ensuring the anonymity of the responses by committing to only reporting responses in the aggregate and omitting names of responding networks.

b. Respondents Should Be Given At Least Sixty Days To Complete The Survey And Completion Of The Survey By Payment Card Networks Should Only Be Required Every Other Year.

The Board opines that the Interchange Network Survey will require only 25 hours, on average, to complete, and thus has proposed that payment card networks only be allowed thirty days to complete the Survey. We believe that the estimated completion time of 25 hours fails to account for the time needed to collect the requested data, to create, analyze, review and confirm reporting based on the requested data, and to complete the Interchange Network Survey, especially during the first survey year. Even with the limiting modifications requested in this letter, we believe completing the Interchange Network Survey fully and accurately will

⁶ In adding comment 7(b)-3 to the Official Board Commentary to Regulation II, the Board expressly acknowledged the acceptability of a payment card network's payment of incentives or other payments to influence merchant routing.

require between 50 and 100 hours of time. As such, we request that, similar to the amount of time provided to issuers to complete the Interchange Issuer Survey, payment networks be allotted sixty days to complete the Interchange Network Survey.

The Board has proposed that payment card networks respond to the Interchange Network Survey annually, even though the Board will only report on the collected information biennially and even though issuers are only required to complete the Interchange Issuer Survey every other year. The Board has not provided justification under Section 920(a) of the Durbin Amendment for requiring this increased burden on payment card networks. Given that completing the Survey every other year will permit the Board to satisfy its statutory reporting obligation under the Durbin Amendment, and in light of the significant burden completion of the Survey imposes on payment card networks, we request that networks receive the same treatment as issuers and only be required to complete the Survey every other year.

II. The Interchange Issuer Survey

Regarding the Interchange Issuer Survey, we request that the Board clarify, by stating explicitly in the Survey instructions, that issuers that only issue cards on three-party systems are not required to complete the Survey. As the Board notes in the General Instructions to the Interchange Issuer Survey, "Regulation II requires that issuers covered by the interchange fee standards in Regulation II file reports with the Board." We agree that only issuers that meet the definition of "issuer" under Regulation II and that are subject to the interchange fee limitations should be required to complete the Interchange Issuer Survey. By definition under Regulation II, an "issuer" is a person that authorizes use of a debit card, and the term "debit card" includes only those cards, codes or devices that are issued or approved for use through a "payment card network." Since cards that operate only on three-party systems are not issued or approved for use through a payment card network (because a three-party system does not involve a payment card network), three-party system cards are not "debit cards" under Regulation II. Accordingly, issuers that solely issue cards on three-party systems are not "issuers" for purposes of Regulation II and should not be required to complete the Interchange Issuer Survey. Consequently, we request that the Board clarify this explicitly in the General Instructions to the Interchange Issuer Survey. Similarly, we request that the Board clarify in the General Instructions to the Interchange Network Survey that reporting payment card networks should not provide information in their Survey responses that relate to three-party system issuance; rather, all Survey responses should relate solely to issuers and related cards and transactions that are subject to Section 920(a) of the Durbin Amendment.

CONCLUSION

Thank you for your consideration of our comments. If you have any questions or wish to further discuss our comments, please do not hesitate to contact us.

Sincerely,

A handwritten signature in black ink, appearing to read "Kelly McNamara Corley". The signature is fluid and cursive, with the first name "Kelly" being the most prominent.

Kelly McNamara Corley
Executive Vice President, General Counsel and Secretary
Discover Financial Services