

May 10, 2024

VIA ELECTRONIC SUBMISSION

Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue NW
Washington, DC 20551
Attn: No. R-1818 (Regulation II)

Re: Debit Card Interchange Fees and Routing, Regulation II; Docket No. R-1818, Document No. 2022-24034

This comment is on behalf of Corner Post, Inc., North Dakota Retail Association, North Dakota Petroleum Marketers Association, and Linney's Pizza, LLC in response to the notice of proposed rulemaking that the Board of Governors of the Federal Reserve System published on November 14, 2023. *See* Debit Card Interchange Fees and Routing, 88 Fed. Reg. 78,100 (2023), perma.cc/JR4F-Z639; *see also* Extension of Comment Period, 89 Fed. Reg. 5,438 (2024) (extending the comment deadline to May 12, 2024).

Corner Post is a truck stop and convenience store in Watford City, North Dakota. Corner Post accepts debit-card payments from its customers, has paid hundreds of thousands of dollars in debit-card fees, and is greatly affected by the Board's interchange-fee standard. NDRA is a nonprofit trade association with its headquarters in Bismarck, North Dakota. NDRA represents the interests of the retailers across North Dakota by monitoring legislative and regulatory activities at the state and federal levels. NDPMA is a nonprofit trade association headquartered in Bismarck. NDPMA represents over 400 petroleum marketers and associate members, including service station dealers, convenience stores, and truck stops.

Linney's Pizza owns and operates a pizza shop in Frankfort, Kentucky. Linney's Pizza similarly accepts debit-card payments, has paid thousands of dollars in fees, and is greatly affected by the Board's interchange-fee standard.

Corner Post, NDRA, NDPMA, and Linney's Pizza sued the Board to challenge Regulation II, 76 Fed. Reg. 43,394 (2011) (as confirmed by the Updated Rule, 80 Fed. Reg. 48,684 (2015)). *See* *Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys.*, 1:21-cv-95-DMT-CRH (D.N.D.); *Linney's Pizza, LLC v. Bd. of Governors of the Fed. Rsrv. Sys.*, No. 3:22-cv-71-GFVT (E.D. Ky.).

Regulation II set the interchange-fee cap at 21 cents per transaction, plus an *ad valorem* component of 0.05% of the transaction's value and 1 cent for fraud prevention. 76 Fed. Reg. at 43,422. The Board's proposed rule now seeks to set the fee cap at 14.4 cents, plus an *ad valorem* component of 0.04% of the transaction's value and 1.3 cent for fraud prevention. 88 Fed. Reg. at 78,100.

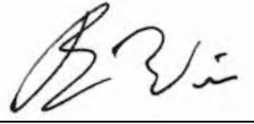
The Board's proposed rule, like Regulation II, is unlawful because it includes categories of costs that the Durbin Amendment prohibits the Board from including in calculating the interchange-fee cap. The Durbin Amendment requires the Board to cap the interchange fees for debit-card transactions at an amount that is "reasonable and proportional to the cost incurred by the [bank] issuer with respect to the transaction." 15 U.S.C. §1693o-2(a)(2). Congress specifically instructed the Board to "distinguish between" two types of costs when setting the fee cap. *Id.* §1693o-2(a)(4)(B). The Board "shall" consider a bank's processing costs for a particular transaction, often called the ACS costs (for "authorization, clearance, or settlement"). *Id.* §1693o-2(a)(4)(B)(i). But the Board "shall not" consider "other costs incurred by an issuer which are not specific to a particular electronic debit transaction." *Id.* §1693o-2(a)(4)(B)(ii).

Contrary to this clear congressional mandate, Regulation II included a third, non-statutory category of allowable costs to calculate the 21-cent "base component": (1) fixed ACS costs, (2) transaction-monitoring costs, (3) an allowance for an issuer's fraud losses, and (4) network-processing fees. 76 Fed. Reg. at 43,429-34. The inclusion of these costs violates the Durbin Amendment. The proposed rule, however, continues to include these unlawful costs as part of the base component. The proposed rule explains that "[t]he Board has reviewed its construction of the [Durbin Amendment] and prior analysis regarding the allowable costs" and "believes that this prior analysis remains sound." 88 Fed. Reg. at 78,104. Accordingly, the proposed rule "does not propose any changes to the allowable costs considered for purposes of the interchange fee standards." *Id.* This methodology renders the proposed rule as unlawful as before.

The Board also proposes "a fixed multiplier of 3.7" to artificially inflate the amount of fees that big banks can charge the merchants. *Id.* at 78,101. This multiplier is also unlawful. The Board concedes that its own data shows that the average per-transaction, "base component" cost dropped to 3.9 cents in 2021. *Id.* at 78,105. As explained above, the base component is already unlawful because the Board, in Regulation II, included prohibited costs in its calculation. The multiplier in the proposed rule makes it worse. The Durbin Amendment—which requires the Board to treat debit-card transactions as a "functional" equivalent of paper checks, 15 U.S.C. §1693o-2(a)(4)(A)—leaves no room for arbitrarily increasing the fee cap by nearly 400% of the per-transaction cost. Nor is the four-fold inflation of the fee cap "reasonable" and "proportional" to the per-transaction cost. 15 U.S.C. §1693o-2(a)(2).

For these reasons, Corner Post, NDRA, NDPMA, and Linney's Pizza urge the Board to reject the proposed rule and instead adopt a standard that (1) does not include the third, non-statutory category of allowable costs and (2) does not use a fixed multiplier.

Respectfully submitted,



Tyler R. Green
CONSOVOY MCCARTHY PLLC
222 S. Main St., 5th Fl.
Salt Lake City, UT 84101
(703) 243-9423
tyler@consovoymccarthy.com

Bryan Weir
Frank H. Chang
Seanhenry VanDyke*
CONSOVOY MCCARTHY PLLC
1600 Wilson Boulevard, Suite 700
Arlington, VA 22209
(703) 243-9423
bryan@consovoymccarthy.com
frank@consovoymccarthy.com
seanhenry@consovoymccarthy.com

**Supervised by principals of the firm who are members of the Virginia bar*