



# Final Rules to Implement Dodd-Frank Requirements for Debit Card Interchange Fees Overturned in Federal Court

08.08.2013

BY: EDMUND D. HARLLEE

On Wednesday, July 31, 2013, the U.S. District Court for the District of Columbia (the “Court”) overturned final rules issued by the Federal Reserve Board (the “Board”) that were designed to implement the “Durbin Amendment” to the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the “Act”). The Durbin Amendment was added to the Act in response to complaints about high “swipe fees” and lack of competition in the debit card transaction market.

On July 20, 2011, the Board issued a final rule implementing its new Regulation II (12 CFR Part 235) with respect to debit card pricing and other requirements for debit card transactions and systems, as required by the Act. Section 1075 of the Act amends the Electronic Fund Transfer Act by adding a new section regarding interchange transaction fees and rules for payment card transactions ([see](#) this publication of August 1, 2011, for a discussion of these final rules). Under the revised statute, an “interchange fee” or “interchange transaction fee” (commonly referred to as “swipe fees”) is any fee established, charged, or received by a payment card network for the purpose of compensating a card issuer for its involvement in an electronic transaction in which a consumer uses a debit card. Swipe fees are typically paid by merchants.

Under the Board’s final rules, issuers may only charge “interchange fees” that are “reasonable and proportional to the cost incurred by the issuer.” If the issuer charges an interchange fee of no more than the sum of (i) 21¢, plus (ii) 5 basis points times the transaction amount, such fee will be deemed to be in compliance.

The final rules became effective on October 1, 2011.

Several groups representing merchants, and two retailers, filed suit against the Board (*NACS v. The Board of Governors of the Federal Reserve System*, case number 1:11-cv-02075, in the U.S. District Court for the District of Columbia), alleging that the caps on interchange fees were set too high by the Board and that the Board's final rules did not allow for increased competition.

With respect to caps on swipe fees, the Court held that the Board had "misinterpreted" the Durbin Amendment's intent to limit the cost of debit transactions to consumers making small-dollar purchases by limiting the cost of these transactions to merchants. Originally, the Board had determined that the cost to a bank to process a debit transaction was 4¢, and the proposed rules contained a cap of 12¢. Following intense lobbying by large banks and major credit card companies during the comment period, however, the Board set the cap at 21¢ plus 5 basis points. The Board said that it had increased the amount to cover a greater range of expense items, such as fraud prevention technology; however, the Court held that the Board had "run afoul" of the Durbin Amendment's intent that these fees more closely reflect the actual cost of processing debit transactions.

The Court also held that the final rules do not promote competition in the debit card transaction processing market, as required by the Durbin Amendment. The final rules contained non-exclusivity and routing provisions that the Court rejected as not satisfying the Durbin Amendment's intent that merchants have the ability to choose processing networks on a transaction-by-transaction basis.

Since the final rules have been in effect since October of 2011, the Court did not vacate the rules, but required the Board to re-issue rules complying with the Court's decision. The timing of the re-issued rules has yet to be determined. The Board is in the process of deciding whether or not to appeal.

## Related People

- Edmund D. "Ed" Harlee – 703.760.5208 – eharlee@williamsmullen.com

## Related Services

- Financial Services