V. The Durbin Amendment: Summary, Impact, and Reform

A. Introduction

One of the purposes of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) was "to protect consumers from abusive financial services practices."[1] The Durbin Amendment (the Amendment), "a last-minute addition" to Dodd-Frank,[2] was meant to aid in this process by lowering fees that merchants pay to banks when customers use debit cards for purchases.[3] In turn, the merchants would then be able to pass the savings onto consumers.[4] The fees are known as interchange fees, which the Amendment defines more technically as "any fee established, charged or received by a payment card network for the purpose of compensating an issuer for its involvement in an electronic debit transaction."[5] The inclusion of payment card networks is extremely significant, since two card networks, Visa and MasterCard, operated a duopoly that reportedly prescribed interchange fees.[6]

---

[1] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, 124 Stat. 1376, 1 (2010).

[2] Tim Chen, *What the Durbin Amendment Means for You*, U.S. NEWS & WORLD REP. (July 12, 2011, 1:19 PM), https://money.usnews.com/money/blogs/my-money/2011/07/12/what-the-durbin-amendment-means-for-you [https://perma.cc/838K-UBTXZQZ] ("The bill, hotly contested and passed along party lines, contained a last-minute addition from Senator Dick Durbin of Illinois.").

[3] Margarette Burnette, *The Durbin Amendment Explained*, NERDWALLET, https://www.nerdwallet.com/blog/banking/durbin-amendment-explained/ [https://perma.cc/8GQ3-EJ7W] (last updated Aug. 30, 2017) ("The Durbin amendment is part of the 2010 Dodd-Frank law, which sharply lowered debit card interchange fees—charges that stores pay banks when a customer makes a purchase using debit cards.").

[4] Press Release, Richard Durbin, U.S. Senator Illinois, Durbin Sends Letter to Wall Street Reform Conferees on Interchange Amendment (May 25, 2010) https://www.durbin.senate.gov/newsroom/press-releases/durbin-sends-letter-to-wall-street-reform-conferees-on-interchange-amendment [https://perma.cc/M7BS-DUKH] ("This amendment, which passed the Senate with 64 votes, will enable small businesses and merchants to lower their costs and provide discounts for their customers.").

[5] 15 U.S.C. § 1693o-2(c)(8) (Supp. IV 2010).

[6] Chen, *supra* note 2.

Every transaction that occurs on Visa and MasterCard involves four parties, not including the card network.[7]

> These parties include: (1) the cardholder who makes the purchase; (2) the merchant who makes the sale and accepts the card payment; (3) the financial institution that issues the card and makes the payment on behalf of the cardholder (the so-called issuer); and (4) the financial institution that collects the payment on behalf of the merchant (the so-called acquirer).[8]

Merchants receive many benefits from consumers' use of bank issued payment cards that most likely make payment cards well worth their costs—for example, consumers are not as restricted by a lack of liquidity and are thus more likely to make purchases with debit cards than if constrained to the money in their pockets, and they allow merchants to "off-load the cost and risk of offering their own credit operations."[9] Banks and payment card networks have invested significantly in the infrastructure of electronic payment cards and financed this investment through the imposition of interchange fees.[10] The networks set the interchange fees for the issuing banks[11] and the

---

[7] Zhu Wang, Scarlett Schwartz, and Neil Mitchell, *The Impact of the Durbin Amendment on Merchants: A Survey Study* (2014). 100 ECON. Q. (NO. 3) 183, 185 (2014) ("Visa, MasterCard, and PIN debit networks are commonly referred to as four-party schemes because four parties are involved in each transaction in addition to the network whose brand appears on the card.").

[8] *Id.*

[9] Todd J. Zywicki, Geoffrey A. Manne & Julian Morris, *Price Controls on Payment Card Interchange Fees: The U.S. Experience* 2 (George Mason Law & Econ. Research Paper No. 14–18, 2014), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2446080 ("Ubiquitous use of payment cards has reduced liquidity and other constraints that previously limited consumer purchases to the amount of money in their wallet . . . . [C]ards enable retailers to off-load the cost and risk of offering their own credit operations . . . . When all of these benefits to merchants are taken into account, payment cards are likely less costly for merchants than cash for a wide range of transactions.").

[10] *Id.* at 3 ("Expansion of the use of these electronic payment systems has necessitated considerable investment . . . funded by interchange fees . . . .").

[11] Wang, *supra* note 7, at 185–86 ("[I]nterchange fees are collectively set by the network on behalf of their member issuers.").

acquiring banks pay the interchange fees.[12] The acquiring banks charge the merchants a "merchant discount rate," which is "the ultimate fee that a merchant has to pay to the acquirer for accepting a card payment, which typically includes the interchange fee plus the markup charged by the acquirer."[13] Unlike the interchange fee, the merchant discount rate is not capped by the Amendment.[14] Most of the interchange fee goes to the issuing bank, and the payment network receives a small, distinct "switch fee."[15]

In 2009, debit cards were used for 37.9 billion transactions and were "the most frequently used noncash method of payment,"[16] which provided $16 billion in debit card interchange fees to the issuing banks.[17] Visa and MasterCard, "who processed over eighty percent of all debit transactions,"[18] set interchange fee rates for every bank in their network, purportedly disallowing banks and merchants to compete and negotiate with each other.[19]

---

[12] Zywicki, *supra* note 9, at 24 ("The interchange fee is actually paid by the . . . bank that collects money on behalf of merchants.").

[13] Wang, *supra* note 7, at 186.

[14] *Id.* ("[T]he regulation sets a cap on the interchange fee but not on the merchant discount rate.").

[15] Arin H. Smith, Note, *Durbin's Defect: The Impact of Post-Recession Legislation on Low Income Consumers*, 89 N.Y.U L. REV. 363, 369 n.17, 369–70 (2014) (indicating that "[t]he network receives a separate, smaller 'switch fee' for its role," though "the retailer's bank receives some of the interchange fee, most of it goes to the card issuer").

[16] Debit Card Interchange Fees and Routing, 76 Fed. Reg. 43,394, 43,395 (July 20, 2011) (codified at 12 C.F.R. pt. 235) (citing the *2010 Federal Reserve Payments Study* and stating that "[d]ebit card payments have grown more than any other form of electronic payment over the past decade . . . [and] are used in 35 percent of noncash payment transactions"). BD. OF GOVERNORS OF THE FED. RES. SYS., THE 2010 FEDERAL RESERVE PAYMENTS STUDY—NONCASH PAYMENT TRENDS IN THE UNITED STATES: 2006–2009 (2011), https://www.frbservices.org/assets/news/research/2010-payments-study-detailed-data.pdf.

[17] Mark D. Manuszak & Krzysztof Wozniak, *The Impact of Price Controls in Two-sided Markets: Evidence from US Debit Card Interchange Fee Regulation* 6 (2017), (Fed. Reserve Bd. Div. of Research & Statistics and Monetary Affairs, Working Paper No. 2017–z074, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2999628.

[18] NACS v. Bd. of Governors of the Fed. Reserve Sys., 746 F.3d 474, 479 (D.C. Cir. 2014).

[19] Press Release, Richard Durbin, *supra* note 4 ("Every bank gets the same interchange fee rate, regardless of how efficiently a bank conducts debit

> Exercising this market power, issuers and networks often entered into mutually beneficial agreements under which issuers required merchants to route transactions on certain networks that generally charged high processing fees so long as those networks also set high interchange fees. Many of these agreements were exclusive, meaning that issuers agreed to activate only one network or only networks affiliated with one company. Networks and issuers also negotiated routing priority agreements, which forced merchants to process transactions on certain activated networks rather than others.[20]

Prior to the Amendment, the average interchange fee for a debit card transaction was 44 cents.[21] While the fees were intended to cover the cost of processing debit transactions, processing costs were decreasing prior to the Amendment, yet Visa and MasterCard continued increasing interchange fees.[22]

Dodd-Frank was signed into law on July 21, 2010.[23] The Amendment authorized the Federal Reserve Board (the Fed) to make interchange fees, for debit card transactions *only*, "reasonable and proportional to the cost incurred by the issuer with respect to the transaction."[24] Senator Richard Durbin believed his amendment would change the "anti-competitive" nature of the interchange system and allow small businesses and merchants to lower their costs.[25] The Amendment has been in effect for six years and it seems the only thing

---

transactions. Visa and MasterCard do not allow banks to compete with one another or negotiate with merchants . . . and there is no constraint on Visa and MasterCard's ability to fix the rates at unreasonable levels.").

[20] NACS, 746 F.3d at 479.

[21] Debit Card Interchange Fees and Routing, *supra* note 16, at 43,397 ("The average interchange fee for all debit card transactions was 44 cents per transaction, or 1.15 percent of the average transaction amount.").

[22] Press Release, Richard Durbin, *supra* note 4.

[23] Chen, *supra* note 2.

[24] 15 U.S.C. § 1693o-2(a)(2) (Supp. IV 2010).

[25] Press Release, Richard Durbin, *supra* note 4 ("This amendment, which passed the Senate with 64 votes, will enable small businesses and merchants to lower their costs and provide discounts for their customers . . . . The amendment has been carefully crafted to address anti-competitive elements in the interchange fee system . . . .").

it has conclusively accomplished is "the redistribution of costs from retailers to bank consumers . . . ."[26]

Having introduced the substance and purpose of the Amendment, this paper continues with a description of how the Amendment's cap came into existence. It then proceeds to a brief summary of the significant litigation involving the interchange cap, followed by an analysis of the impact of the Amendment on merchants, banks and consumers. This leads to a succinct discussion on the options consumers have to avoid bearing the costs of the Amendment and potential reforms that could fix the Amendment's defects.

B. The Fed's Final Rule

The Fed announced its first proposed rule to regulate interchange fees on December 16, 2010, suggesting an interchange transaction fee cap at 12 cents, and, keeping in line with the Amendment's prohibition against exclusivity arrangements,[27] a requirement that debits cards be processed on two independent networks.[28] The Fed received over 11,500 comments, "including comments from issuers, payment card networks, merchants, consumers, consumer advocates, trade associations, and members of Congress."[29] Merchants and their trade groups, as well as some consumers and consumer groups, were receptive to the proposed cap and believed the savings from lower interchange fees would be passed on to consumers.[30] Payment card networks, issuing banks, their trade groups, and other consumers contested the cap, however, believing it would result in decreased revenue for issuing banks, decreased availability of debit card services, and increased cardholder fees.[31]

---

[26] Zywicki, *supra* note 9, at 17.
[27] 15 U.S.C. § 1693o-2(b)(1) (Supp. IV 2010).
[28] Chen, *supra* note 2 ("At the end of 2010, Chairman Ben Bernanke proposed a 12-cent cap on debit swipe fees and a requirement that debit cards be processed on at least two independent networks.").
[29] Debit Card Interchange Fees and Routing, *supra* note 16, at 43,394.
[30] *Id.* at 43,402 ("Merchants, their trade groups, and some consumers supported the Board's proposal and argued that the proposal would lower the current interchange fees (the savings of which could be passed on to consumers as lower retail prices) . . . .").
[31] *Id.* ("By contrast, issuers, their trade groups, payment card networks, and some consumers opposed the proposal for a range of reasons, including

On March 15, 2011, a bill was introduced to delay the Amendment's implementation so that the possible effects of the Amendment could be analyzed and better understood.[32] Shortly after, Fed Chairman Ben Bernanke, declared that the April deadline to announce a final rule would be missed.[33] After the bill to delay implementation fell short, the Fed issued a final rule on June 29, 2011,[34] capping the interchange transaction fee at 21 cents with a small *ad valorem* fee.[35] The cap is the same for both PIN and signature debit cards.[36] Under the rule, issuers are eligible for an additional cent per transaction if they comply with anti-fraud procedures, and, as the Amendment originally promulgated, issuing banks are exempt from the rule altogether if their total assets are less than $10 billion.[37] It was hoped that this would protect small banks and allow them to issue cards competitively with the big banks.[38] It further required that at least two unaffiliated networks be able to process transactions on each

---

concern that it would decrease revenue to issuing banks; result in increased cardholder fees or decreased availability of debit card services . . . .").

[32] Chen, *supra* note 2 ("Democratic Senator Jon Tester of Montana, along with Republican Bob Corker of Tennessee, introduced a bill that would defer interchange regulation for a year while the Fed studied possible effects . . . .").

[33] *Id.* ("Chairman Ben Bernanke . . . promised to announce the final rules in April of 2011 . . . . Bernanke announced that he would need more time to finalize the regulation.").

[34] *Id.* ("In a down-to-the-wire vote that split the Democratic leadership, Tester's bill gained a majority vote in the Senate but fell short of the 60 votes needed to avoid a filibuster . . . . June 29, 2011: Fed (finally) issues the regulations").

[35] Debit Card Interchange Fees and Routing, *supra* note 17, at 43,404 ("[T]he final rule . . . provides that an issuer may not receive or charge an interchange transaction fee in excess of the sum of a 21-cent base component and 5 basis points of the transaction's value (the *ad valorem* component).").

[36] Wang, *supra* note 7, at 184 ("This cap applies to both signature and PIN debit cards.").

[37] 15 U.S.C. § 1693o-2(a)(6)(A) (Supp. IV 2010) ("This subsection shall not apply to any issuer that, together with its affiliates, has assets of less than $10,000,000,000 . . . ."); Debit Card Interchange Fees and Routing, *supra* note 16, at 43,404 ("[T]he fraud-prevention adjustment . . . sets the adjustment at 1 cent per transaction . . . . The final rule exempts . . . standard issuers that, together with affiliates, have assets less than $10 billion . . . .").

[38] Press Release, Richard Durbin, *supra* note 4 ("The amendment has been carefully crafted to address anti-competitive elements in the interchange fee system while preserving the ability of small banks and credit unions to compete with big banks in issuing cards.").

debit card, "in an effort to force networks to compete for merchants' business."[39] On October 1, 2011, card networks had to start abiding by the cap and allowing cards to be processed on independent networks.[40] The cap reduced the average interchange fee by approximately 52 percent.[41]

C. Litigation

On November 22, 2011, distressed that the Fed almost doubled the original proposed cap, four major trade associations and two individual retail operations—the National Association of Convenience Stores, National Retail Federation, Food Marketing Institute, Miller Oil Co., Inc., Boscov's Department Store, LLC and National Restaurant Association (collectively, the Plaintiffs)—brought suit against the Fed.[42] The Plaintiffs claimed that "the Final Rule's interchange fee and network non-exclusivity provisions (12 C.F.R. §§ 253.3(b) and 235.7(a)(2)) are arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the law."[43] The district court ruled in favor of the Plaintiffs and found that the Amendment proscribed exactly which fees the Fed could consider during rule making, and decided the Fed should not have considered issuers' other tangential costs not mentioned in the statute.[44] Further,

---

[39] NACS v. Bd. of Governors of the Fed. Reserve Sys., 746 F.3d 474, 477 (D.C. Cir. 2014).

[40] Chen, *supra* note 2 ("The Fed also moved back the implementation date from July 21st to October 1st. On that date, card networks (like Visa) must honor the 21-cent cap and allow debit cards to be processed on at least two independent networks.").

[41] Zywicki, *supra* note 9 ("This had the effect of cutting the average interchange fee for covered banks from $0.50 to $0.24 per transaction, or approximately 52 per cent.").

[42] NACS v. Bd. of Governors of the Fed. Reserve Sys., 958 F. Supp. 2d 85, 86, 96 (D.D.C. 2013) ("Plaintiffs NACS (formerly, the National Association of Convenience Stores), National Retail Federation ('NRF'), Food Marketing Institute ('FMI'), Miller Oil Co., Inc. ('Miller'), Boscov's Department Store, LLC ('Boscov's') and National Restaurant Association ('NRA') (collectively, 'plaintiffs') . . . .").

[43] *Id.*

[44] *Id.* at 99 ("[T]he plain language and legislative history of the statute make clear which issuer costs may be included in the interchange transaction fee standard, and the Board's inclusion of other costs cannot survive scrutiny under *Chevron's* first step.").

the court found that the statute's language required that merchants have options between various unaffiliated networks for each transaction, not just for each card, as the Fed interpreted.[45] The Appellate Court reversed the District Court's decision, finding that "the Board's rules generally rest on reasonable constructions of the statute . . . ."[46] The Supreme Court denied certiorari.[47] Thus, the big banks won a comparatively small victory.

D. Impact

1. *Effect on Merchants*

The results from a merchant survey, conducted by the Federal Reserve Bank of Richmond and Javelin Strategy & Research, show that two years after the Amendment took effect, the majority of merchants either did not notice that their debit costs changed or reported that their costs remained the same.[48] Roughly a quarter felt debit costs increased, while less than 10 percent reported their debit costs decreased.[49] The report on the survey also highlighted that merchant reactions to changes in debit costs lacked correspondence—in other words, few merchants reduced prices as debit costs decreased, but a substantial amount increased prices as debit costs increased.[50]

---

[45] *Id.* at 102 ("[T]he statute's language and purpose, which require that merchants be given a choice between multiple unaffiliated networks not only for each card, but for each *transaction.*").
[46] NACS v. Bd. of Governors of the Fed. Reserve Sys., 746 F.3d 474, 477 (D.C. Cir. 2014).
[47] NACS v. Bd. of Governors of the Fed. Reserve Sys., 135 S. Ct. 1170, 1170 (2015) ("Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit denied.").
[48] Wang, *supra* note 7, at 207 ("The majority of merchants in the survey sample (about two-thirds) reported no change or did not know the change of debit costs post-regulation.").
[49] *Id.*
[50] *Id.* at 205 ("On the one hand, few merchants in our sample are found to reduce prices or debit restrictions as their debit costs decrease . . . . On the other hand, a sizable fraction of merchants are found to raise prices or debit restrictions as their debit costs increase.").

a) Small and Medium Merchants

The average merchant discount rate for a sample of small and medium merchants decreased by .02 percent from 2012 to 2013.[51] This decrease is negligible because the majority of the savings from the significant drop in interchange fees was captured by acquiring banks.[52] "Thus, a merchant with annual turnover of $3,000,000 who obtains the average net reduction in . . . [merchant discount rate] would save only $730 per year as a result of the Durbin Amendment."[53] This example illustrates the scant savings small to medium merchants have to pass on to consumers.

b) Large Merchants

Large retailers, however, are more likely to have felt the benefits of the Amendment.[54] This is probably due to the fact that they have better bargaining power to reduce the merchant discount rate, they are better able to manipulate market prices, and thereby, are better able to decline to pass savings on to customers.[55] Further, because the smaller merchants have not seen significant savings from the Amendment, larger merchants are not experiencing price competition from the smaller merchants.[56] An assessment by Edgar, Dunn and Company that attempted to calculate the savings due to the Amendment of the top twenty merchants by sales has led some academics to conclude from the results that "the benefits to very large

---

[51] Zywicki, *supra* note 9, at 24 ("[I]nter change fees and gross acquirer margins for a sample of 1,000 merchants in 23 different sectors, we found that the weighted average per-transaction MSC fell by only 0.02%, from 1.99% to 1.97% . . . .").
[52] *Id.* ("The reason is that, although the weighted average interchange fee fell from 1.07% to 0.74% in this group, nearly all the difference (93%) was captured by the acquiring banks . . . .").
[53] *Id.* at 25.
[54] *Id.*
[55] *Id.* at 25–26 (arguing that large retailers have "greater bargaining power to negotiate a more significant reduction in merchant service charge . . . [which] means they will have less incentive to pass through any savings to consumers . . . [while] smaller merchants have experienced almost no reduction in their MSC . . . [therefore] large retailers have experienced limited price competition from small retailers that would force them to pass-through their own savings").
[56] *Id.*

merchants on average are at least ten times as large as the benefits to small merchants."[57]

However, this isn't the full story. Some large merchants have been hurt by the Amendment due to the nature of their business, i.e., a high amount of small value transactions, like those done by Subway, McDonalds and Wendy's.[58] Before the Amendment came into existence, payment networks had varied interchange fees, and they would charge lower interchange fees for small transactions.[59] "As banks attempted to recoup some of the lost revenue from the cap, the regulation acted as a "floor" as much as a "ceiling," bringing these previously lower rates up . . . ."[60] This caused a 12 percent increase in interchange fees for merchants whose individual transactions average less than $10.[61] There is evidence that these small-transaction retailers are passing these losses on to customers.[62]

On the other hand, interchange fees have decreased by 64 percent for merchants whose individual transactions average over $200.[63] Yet, of the large merchants whose merchant discount rates have decreased significantly, there are no signs that their savings have

---

[57] *Id.* at 26.
[58] *Id.* ("[E]ven some large merchants suffered because of the relatively small value of each transaction . . . .").
[59] *Id.* ("The reason for this is that prior to the implementation of the Durbin Amendment payment networks had charged lower interchange fees for very small transactions.").
[60] *Id.*
[61] *Id.* ("The effect, as the FDIC's Scott Strockoz observes, has been that 'debit card interchange fees have increased by 12% for merchants on an average retail sale under $10.'") (quoting Scott D. Strockoz, Dodd-Frank and the Durbin Amendment—Is It Working as Intended? ii (2012) (Capstone Strategic Project, American Bankers Association Stonier Graduate School of Banking), available at http://www.abastonier.com/stonier/wp-content/uploads/2012-Capstone-Strokoz.pdf).
[62] *Id.* at 28 ("Meanwhile, as noted above, retailers of smaller ticket items in particular have seen increased interchange fee costs as a result of the Durbin Amendment, and there is anecdotal evidence that these fees are being passed on to consumers.").
[63] *Id.* at 26 ("'In contrast, those retailers with transactions averaging over $200 have seen a decrease in their interchange fees by 64%.'") (quoting Scott D. Strockoz, Dodd-Frank and the Durbin Amendment—Is It Working as Intended? ii (2012) (Capstone Strategic Project, American Bankers Association Stonier Graduate School of Banking), available at http://www.abastonier.com/stonier/wp-content/uploads/2012-Capstone-Strokoz.pdf).

been passed on to consumers.[64] In sum, "the pass-through of the revenue loss to bank consumers is expected to be much larger than the pass-through of retailers' savings."[65]

2. *Effects on Banks and Consumers*

Overall, in response to the Amendment, non-exempt banks changed the structure of the accounts they offer in ways that increased fees for customers, specifically "lower availability of free accounts, higher monthly fees, lower likelihood that the monthly fee could be avoided, and a higher minimum balance to avoid the fee."[66] Further, although to a lower degree, exempt banks raised their prices due to competition with non-exempt banks.[67]

a) Big Banks—Higher Banking Fees

After the Amendment went into effect, bank profits from interchange fees decreased by as much as $8 billion.[68] The Amendment excludes many of the costs associated with running a debit card program from allowable costs, "such as customer service, data services, branch networks, [and] card-issuance . . . ."[69] Hence, in the eyes of the non-exempt banks, it "has effectively transformed debit card operations from a profit centre to a loss centre for covered

---

[64] *Id.* at 27 ("While many larger merchants experienced reductions in their MSC as a result of the cap on debit interchange fees, there is little evidence of any of those savings being passed on to consumers.") (citing ELEC. PAYMENTS COAL., WHERE'S THE DEBIT DISCOUNT: DURBIN PRICE CONTROLS FAIL TO RING UP SAVINGS FOR CONSUMERS (2011), http://debanked.com/EPCDebitstudy.pdf).
[65] *Id.* at 29.
[66] Manuszak & Wozniak, *supra* note 17, at 5, 21 ("[C]overed banks changed various account terms and fees in ways that increased prices for accountholders.").
[67] *Id.* at 24 ("[P]rices increased at exempt banks facing more significant competition from covered banks.").
[68] Zywicki, *supra* note 9, at 5 ("After Durbin went into effect, revenues from interchange fees are estimated to have fallen by between $6.6 billion and $8 billion annually.").
[69] *Id.* ("[I]t prohibits recovery in interchange fees for many of the other costs related to debit card operations, such as customer service, data services, branch networks, card-issuance, fraud and loss protection and the like.").

banks."[70] A 2016 letter from the Electronics Payments Coalition, which includes many banking and finance associations, to two Congressman who wanted the Amendment repealed as part of the Financial CHOICE Act, summarizes the card payment networks' and big banks' position:

> [T]he Durbin Amendment did not serve any traditional regulatory purpose—it simply enshrined into law a "permanent" economic benefit for one well-heeled industry. The bottom line is this amendment introduced price-fixing to a formerly functional and competitive marketplace and failed to keep the dubious promises made to sell it—ultimately hurting customers.[71]

Shortly after the Amendment went into effect, many of the large banks implemented monthly fees on debit cards—Bank of America, for example was planning to charge a $5 monthly fee on debit purchases—to regain loses from the interchange fee cap.[72] Consumers and lawmakers voiced their outrage and Wells Fargo, JP Morgan Chase, Bank of America, and their peers dropped these fees.[73] However, fees charged on deposit accounts, which include monthly account maintenance charges, insufficient-fund fees, and inactivity fees, rose an average of 2 percent after the Amendment went into effect.[74] Further, banks cut debit reward programs and increased rewards for using credit cards, which were unaffected by the Amendment.[75] Additionally, by 2011, two-thirds of the big banks had

---

[70] *Id.* at 4.
[71] Letter from EPC's Members to Jeb Hensarling, Chairman, House Comm. on Fin. Servs., and Randy Neugebauer, Chairman, Subcomm. on Fin. Insts. and Consumer Credit (June 14, 2016), available at http://www.electronicpaymentscoalition.org/resource/epc-members-joint-letter-to-chairmen-hensarling-and-neugebauer/.
[72] Kalyan Nandy, *BofA Calls Off Debit-Card Fee*, ZACKS (Nov. 2, 2011), https://www.zacks.com/stock/news/63909/bofa-calls-off-debitcard-fee [https://perma.cc/EC2A-2JBA].
[73] *Id*.
[74] Burnette, *supra* note 3.
[75] *Id.* ("Banks also cut back on debit card rewards programs. Instead, banks added more rewards to credit cards, which weren't covered by the Durbin amendment.").

eliminated free-checking.[76] A year after the Amendment went into effect, the availability of free current accounts at banks subject to the interchange cap dropped from 51 percent to 27 percent.[77] In sum, "the decline in free current accounts and increase in bank fees correlates almost perfectly with the Amendment and is not well-explained by other factors, such as the recession or lingering effects of the banking crisis."[78]

b) Effect on Exempt Banks

All payment card networks established tiered fee schedules, so the average interchange fee for exempt banks did not change.[79] However, it seems competition among banks generated an industrywide response and exempt banks also generally raised their prices, though, not as much as the big banks.[80] Perhaps part of the reason costs at exempt banks increased is due to the fact that "the Durbin Amendment offers no exemption from network routing and exclusivity provisions that require issuers to add an 'unaffiliated' payment network to their debit cards, which involves substantial and recurring administrative costs."[81] But unlike the non-exempt banks, exempt banks actually increased access to free current accounts for

---

[76] Maria Aspan, *Free Checking Thrives at Smaller Banks, Durbin Notwithstanding*, AM. BANKER (Aug. 29, 2011), https://www.americanbanker.com/news/free-checking-thrives-at-smaller-banks-durbin-notwithstanding [https://perma.cc/EFR6-YB82] .

[77] Zywicki, *supra* note 9, at 10 (citing Richard J. Sullivan, *The Impact of Debit Card Regulation on Checking Account Fees*, 98 FED. RES. BANK KAN. CITY ECON. REV. 59, 65–66 (2013), available at http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.434.2640&rep=rep1&type=pdf [https://perma.cc/WG48-3WAP]).

[78] *Id.* at 11.

[79] Manuszak & Wozniak, *supra* note 17, at 7 n.11 ("All networks have since established tiered fee schedules with no material change in average interchange fees for exempt banks . . . .").

[80] *Id.* at 24–25 ("[P]rices increased at exempt banks facing more significant competition from covered banks. However, the magnitude of the estimated competitive response is generally smaller than the pricing response estimated for the covered banks . . . . [T]hey illustrate that competition among firms may generate an industrywide response even for a policy that only targets a specific set of firms.").

[81] Camden R. Fine, Opinion, *How the Durbin Amendment Has Failed Banks, Consumers*, AM. BANKER (July 25, 2016), https://www.americanbanker.com/opinion/how-the-durbin-amendment-has-failed-banks-consumers.

customers; from 2011 to 2012, exempt banks offering free current accounts increased by 7 percent.[82]

c) Low-Income Hurt the Most

Low-income and moderate-income consumers are being hit the hardest by the Amendment—they are not seeing the price cuts from the retailers and the banks are no longer incentivized to provide debit usage rewards.[83] "[A] typical lower income bank customer who previously qualified for a free current account but, after Durbin, no longer meets the minimum monthly balance requirement, is likely paying around $12 in monthly fees, as well as an additional $1 or more in ATM fees."[84] This is costing these low-income customers around $160 annually.[85] For these reasons, many of the low income customers that were able to enter the banking system in the 2000s have been forced out.[86] A survey by the Federal Deposit Insurance Corporation reported that the number of unbanked households increased by a million from 2009 to 2011.[87]

---

[82] Zywicki, *supra* note 9, at 10 ("[A]mong banks in the control group exempt from the Durbin Amendment, 'the share offering free [current accounts] rose from 37 per cent in 2011 to 44 per cent in 2012.'") (quoting Richard J. Sullivan, *The Impact of Debit Card Regulation on Checking Account Fees*, 98 FED. RES. BANK KAN. CITY ECON. REV. 59, 65–66 (2013), available at http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.434.2640&rep=rep1&type=pdf [https://perma.cc/WG48-3WAP]).

[83] Harry C. Alford, *After 6 Years, Consequences of the Durbin Amendment Are Evident*, FORBES (Mar. 1, 2017), https://www.forbes.com/sites/realspin/2017/03/01/after-6-years-consequences-of-the-durbin-amendment-are-evident/#3aa78727bd9d [https://perma.cc/XBZ2-WKER] (explaining that consumers are being hurt "[b]ecause retailers aren't paying their fair share of transaction fees, [so] banks and financial institutions now have less flexibility to offer incentives like debit rewards programs").

[84] Zywicki, *supra* note 9, at 9.

[85] *Id.*

[86] *Id.* at 13 ("[M]any consumers who had been brought into the banking system during the growth in free current accounts throughout the 2000s have now found themselves thrown back out of the banking system.").

[87] *Id.* at 14 ("According to a Survey by the Federal Deposit Insurance Corporation, the number of unbanked households in America surged by almost 1 million between 2009 and 2011 . . . .").

d) Consumer Options

Consumers whose bank costs have increased may consider opening a checking account at an exempt financial institution, for example, banks with less than $10 billion in assets, many of which still provide free checking and debit card usage rewards.[88] Further, consumers who are diligent about paying their credit card balance in full each month, should contemplate using their credit card for a majority of purchases to take advantage of superior rewards.[89]

E. Proposed Reform

A repeal of the Amendment was originally included in a version of the Financial CHOICE Act, but it was dropped due to pressure from retailers, Democrats, and some Republicans.[90] While repealing the Amendment is an option, there is a strong argument that this will not fix the prior problems that were endemic to the payment card industry.[91] Perhaps the Amendment has been unsuccessful at accomplishing its goals "not because it regulates, but because it regulates poorly."[92] Banks have easily been able to sidestep the regulation by incentivizing customers to use credit cards, which are not subject to the cap.[93] Perhaps with lower credit *and* debit card interchange fees, consumers would be more likely to receive the

---

[88] Burnette, *supra* note 3 ("The Durbin amendment exempts financial institutions with less than $10 billion in assets, which excludes most community banks and credit unions. Many smaller institutions offer free checking, and some still provide rewards on debit card usage.").

[89] *Id.* ("You use could also a credit card for most of your purchases to take advantage of rewards options . . . . This approach works best if you pay your balance in full every month. Otherwise, the interest you pay may negate the value of any rewards.").

[90] Andrew Soergel, *House GOP Abandoning Repeal of Cap on Debit Fees*, U.S. NEWS & WORLD REP. (May 25, 2017, 1:29 PM), https://www.usnews.com/news/articles/2017-05-25/hensarling-to-drop-durbin-amendment-repeal-as-part-of-dodd-frank-overhaul [https://perma.cc/WYE2-PGS2] ("Hensarling indicated . . . he intends to drop the measure to give the Financial Choice Act a better shot at passing").

[91] Manuszak & Wozniak, *supra* note 17, at 25 ("[P]olicymakers need to take a broad view of an entire industry, even when evaluating policies that directly target only a subset of firms.").

[92] Smith, *supra* note 15, at 384.

[93] *See generally id.* at 385.

intended benefits of the Amendment.[94] This change would make banks less inclined to offer superior rewards on credit cards, which low income consumers often cannot access in the first place.[95]

The counterargument is that capping interchange fees for both debit and credit cards would almost certainly raise banking fees even higher.[96] Thus, if this change were to be implemented, Congress should allow the Fed to consider banking costs when setting the cap and give the Fed the power to force banks to increase transparency so that consumers know why their costs are increasing and can switch banks if necessary.[97] Congress could also consider additional ways to expand access to banking for low income consumers, such as: "providing tax credits to financial institutions that serve low-income consumers, supporting programs that identify and punish discriminatory activities in banking services, and establishing financial education programs that change consumers' savings behavior."[98] Further, since exempt banks raised their prices too, regulators need to more carefully consider the effects a new policy will have on the entire banking industry, not just the covered banks.[99]

F. Conclusion

The evidence suggests that the Amendment has been bad for consumers. Ironically, it is costing the population it was intended to aid. While repealing the Amendment is a popular option, it is likely such option may not fix the problems that were present before its implementation, nor is there an infallible reason to believe that the higher banking costs that arose as a result of the Amendment will be reversed upon the Amendment's repeal. Therefore, more carefully studied regulations might be the answer. Further, easier access to cost

---

[94] *Id.* ("[T]he probability that the Amendment will achieve its stated goal of lower retail prices at least is higher if both [credit and debit card] fees are capped . . . .").

[95] *Id.* ("This would also tend to reduce the incentive for banks to attach benefits to credit cards, which many low-income customers cannot access, rather than debit cards.").

[96] *Id.* ("[T]his change, implemented alone, would likely force even higher prices in banking.").

[97] *Id.* ("Therefore, this Note further recommends that Congress permit the Federal Reserve to consider the cost of card use when setting fee caps and also to affirmatively address banking disclosures.").

[98] *Id.* at 387.

[99] Manuszak & Wozniak, *supra* note 17, at 25.

efficient banking will help low income consumers avoid bearing the cost of regulating the payment card industry.[100]

Ryan McCarthy[101]

[100] Smith, *supra* note 15, at 387 ("[T]he extra costs required to maintain unprofitable checking accounts would still be borne by low-income consumers, which would serve as a barrier to entry in banking.").
[101] Student, Boston University School of Law (J.D. 2019).