UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

NACS; NATIONAL RETAIL FEDERATION; FOOD MARKETING INSTITUTE; MILLER OIL CO.; BOSCOV'S DEPARTMENT STORE, LLC; and NATIONAL RESTAURANT ASSOCIATION, Plaintiffs, v. BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, Defendant.	No. 1:11-cv-02075-RJL

BRIEF AMICI CURIAE OF THE CLEARING HOUSE ASSOCIATION L.L.C., AMERICAN BANKERS ASSOCIATION, CONSUMER BANKERS ASSOCIATION, CREDIT UNION NATIONAL ASSOCIATION, THE FINANCIAL SERVICES ROUNDTABLE, INDEPENDENT COMMUNITY BANKERS OF AMERICA, MID-SIZE BANK COALITION OF AMERICA, NATIONAL ASSOCIATION OF FEDERAL CREDIT UNIONS, AND NATIONAL BANKERS ASSOCIATION PURSUANT TO THE COURT'S ORDER OF AUGUST 14, 2013

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INTRODUCTION

The Court requested supplemental briefing from the parties and *amici* on whether the Court should order the Federal Reserve Board to issue an interim rule to take effect during the Board's appeal to the D.C. Circuit.[1] The Court indicated during the hearings of August 14 and 21, 2013 that it was inclined to require the Board to issue such an interim rule on an expedited basis. *Amici* respectfully disagree with the Court's provisional position.

First, there is no proper legal basis for such an order. Under settled D.C. Circuit precedent, this Court lacks authority to require the Board either to issue an interim rule or to conduct expedited rulemaking. Only the Board can determine whether and when to issue any interim rule.

Second, separate from the question of legal authority, the Court should not require an interim or expedited rule. A rush to issue a new rule will harm all affected interests, including consumers, and threaten the effective functioning, stability, and security of the electronic debit card payments system. As the Board told this Court at the August 21 hearing, any new rulemaking would be far from simple, given the number of complicated issues the Board will need to address. Industry implementation of an interim rule would also be difficult, requiring complex undertakings by networks, issuers, acquirers, and merchants. And haste will compromise the quality of the result, with the negative impacts extending to consumers and the electronic debit card payments system.

Third, an order requiring the Board to issue an interim or expedited rule will almost certainly precipitate more litigation, which would further muddy the regulatory landscape in an area where parties need sure guidance. The litigation could come from the Board (in a challenge

[1] The Court earlier granted *amici* the opportunity to participate in this supplemental briefing. *See* Aug. 14 Hr'g Tr. 18-19.

to this Court's authority to require issuance of an interim or expedited rule) or from one or more issuers (in a challenge, among other things, to the confiscatory nature of an interim interchange fee rule).

For all these reasons, *amici* agree with the Board and Plaintiffs that vacatur should be stayed pending the Board's appeal and, accordingly, that current Regulation II should remain in effect during that time period.

ARGUMENT

I. The Court Cannot Require The Board To Issue An Interim Or Expedited Rule

This Court lacks authority to order the Board to issue an interim or expedited rule. Section 706(2) of the Administrative Procedure Act, the only provision under which Plaintiffs sought relief, authorizes a reviewing court to "hold unlawful and set aside agency action," 5 U.S.C. § 706(2), but it does not permit a court to compel an agency to act. Rather, "[u]nder settled principles of administrative law," where, as here, "a court reviewing agency action determines that an agency made an error of law, the court's inquiry is at an end: the case must be remanded to the agency for further action consistent with the corrected legal standards." *PPG Indus., Inc. v. United States*, 52 F.3d 363, 365 (D.C. Cir. 1995) (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 94-95 (1943)); *see also N. Air Cargo v. U.S. Postal Serv.*, 674 F.3d 852, 861 (D.C. Cir. 2012) (vacating district court judgment and noting that "[i]t was quite anomalous [for the district court] to issue an injunction" upon court's determination that agency acted unlawfully); *Palisades Gen. Hosp. Inc. v. Leavitt*, 426 F.3d 400, 403 (D.C. Cir. 2005) ("The district court had no jurisdiction to order specific relief. … [It] had jurisdiction *only* to vacate the Secretary's decision … and to remand for further action consistent with its opinion.") (emphasis added); *Cnty. of Los Angeles v. Shalala*, 192 F.3d 1005, 1011 (D.C. Cir. 1999) (upon determination that

agency misinterpreted statute, district court committed error when it "devise[d] a specific remedy for the [agency] to follow").

Directly on point is *Shays v. U.S. Federal Election Commission*, 508 F. Supp. 2d 10 (D.D.C. 2007), *rev'd in part on other grounds*, 528 F.3d 914 (D.C. Cir. 2008). There, where the court found a number of Commission regulations unlawful, the plaintiff requested that the court "'order the Commission to commence expedited rulemaking proceedings and to adopt appropriate interim regulations to govern during the pendency of its rulemaking proceedings.'" *Id.* at 70. The court rejected that request. Citing the same "settled principles of administrative law" discussed above, the *Shays* court found no basis for ordering an interim rule and instead remanded the case "for further action consistent with this opinion." *Id.* at 70-71. Thus, while this Court has authority to vacate the Board's rule, rather than allowing current Regulation II to remain in place during any remand, that is all that the Court can do. It cannot require the Board to promulgate an interim rule.

Nor can this Court order the Board to engage in expedited rulemaking, as the *Shays* decision also demonstrates. *See id.* At the August 21 hearing, Plaintiffs' counsel suggested that a nearly-four-decade-old D.C. Circuit decision, *Rodway v. U.S. Department of Agriculture*, 514 F.2d 809 (D.C. Cir. 1975), might provide this Court with authority to order the Board to act within a shortened time frame. *Rodway* does not provide that authority. The D.C. Circuit's more recent decision in *Consumer Federation of America v. U.S. Department of Health & Human Services*, 83 F.3d 1497 (D.C. Cir. 1996), governs, and that decision makes clear that an order for expedited rulemaking "constitutes *extraordinary relief*, and is to be granted *only* upon a finding of unreasonable delay or imminent risk to public health and welfare." *Id.* at 1507 n.8 (emphasis added); *cf. NRDC v. EPA*, 489 F.3d 1364, 1375 (D.C. Cir. 2007) (declining to "set a two year

limit on EPA's proceedings on remand as the NRDC requests; mandamus affords a remedy for undue delay"). Applying that standard in *Consumer Federation*, the D.C. Circuit reversed a district court order that had required the agency to publish "new proposed regulations within 90 days, and a final rule 'within a reasonable time thereafter.'" 83 F.3d at 1500. Finding neither unreasonable delay nor imminent risk to the public, the D.C. Circuit rejected the district court's order. *See id.* at 1507 n.8. Since the time *Consumer Federation* was decided, courts in this Circuit have repeatedly acknowledged the limits of their authority under that binding D.C. Circuit decision. *See, e.g.*, *Alliance for Natural Health US v. Sebelius*, 714 F. Supp. 2d 48, 72 (D.D.C. 2010); *Whitaker v. Thompson*, 248 F. Supp. 2d 1, 17 n.20 (D.D.C. 2002); *Pearson v. Shalala*, 130 F. Supp. 2d 105, 120 n.34 (D.D.C. 2001).

Neither of the two *Consumer Federation* requirements for "extraordinary relief" exists in this case. The Board has not engaged in any delay, much less unreasonable delay. To the contrary, the Board filed its notice of appeal weeks before the federal rules required, and the Board will seek to have the D.C. Circuit appeal expedited. Nor is there "imminent risk to public health and welfare"—an exception that *Consumer Federation* construed narrowly. 83 F.3d at 1507 n.8. In that case, the D.C. Circuit acknowledged that the regulations at issue addressed "serious" "health risks posed by unreliable clinical tests," but concluded that the record revealed no "'significant risk of grave danger'" necessary to justify expedited rulemaking. *Id.* (quoting *Public Citizen Health Research Grp. v. Auchter*, 702 F.2d 1150, 1157 (D.C. Cir. 1983)). To be sure, this case has significant economic consequences, but it is not a situation where "human lives are at stake." *Public Citizen Health Research Grp.*, 702 F.2d at 1157; *see id.* ("Delays that might be altogether reasonable in the sphere of economic regulation are less tolerable when

human lives are at stake."). Accordingly, under *Consumer Federation*, "[an] order to expedite rulemaking [would be] inappropriate." 83 F.3d at 1507 n.8.

II. In Any Event, Neither An Interim Nor An Expedited Rule Is Warranted

Even if this Court did have authority to require the Board to issue an interim rule or to conduct expedited rulemaking, it should not do so. Both the Board and the industry (including the merchants) would have substantial undertakings on their hands were this Court to require an interim rule. There is no reason to impose those burdens unnecessarily—with a D.C. Circuit ruling (likely in an expedited appeal) on the horizon, which may moot any such interim rule in whole or in part. There is certainly no reason to do so under a compressed timeline, as haste will only increase the costs and burdens while threatening the stability and efficacy of the electronic debit card payments system.

First, *amici* respectfully submit that this Court has underestimated the amount and complexity of work remaining for the Board in issuing an interim rule. As the Board's General Counsel put it during the August 21 hearing, this Court's "ruling is very broad in its effect and would require redoing large parts of our rule, particularly on the routing exclusivity aspect." Aug. 21 Hr'g Tr. 8. On the interchange fee rule, the Board's work is not as simple as merely adding up the incremental costs of authorization, clearance, and settlement and setting a fee cap. Rather, the Board must now settle the meaning of "incremental cost" in 15 U.S.C. § 1693*o*-2(a)(4)(B)(i). In its notice of proposed rulemaking, the Board acknowledged that "[t]here is no single, generally-accepted definition of the term 'incremental cost,'" and therefore abandoned the statutory term altogether, instead proposing to use issuers' "average variable cost[s]." 75 Fed. Reg. 81,722, 81,735 (Dec. 28, 2010). In the notice of final rulemaking, the Board noted the significant comment it received on this issue but determined—in light of the Final Rule's overall approach to costs—that it was unnecessary to determine what "incremental cost" means. *See* 76

Fed. Reg. 43,394, 43,426-43,427 (July 20, 2011). The Board now would be required to address this issue.

This Court's apparent assumption that the Board could promptly issue a new rule also fails to account for another point regarding the interchange fee rule. While this Court's decision addressed the *cost baseline* that the Board may "consider" in issuing any interchange fee standards (*see* 15 U.S.C. § 1693*o*-2(a)(3)), the statute provides that the allowable interchange fee is an amount that is "reasonable and proportional to" costs (*see id.* §§ 1693*o*-2(a)(2), (a)(3)(A)). In any interim rule, the Board would be required to address the "reasonable and proportional" issue as well, especially given the harsh impact of a fee cap set at the cost baseline in this Court's decision. The Electronic Funds Transfer Act *requires* the Board to consider the impact of any rule on financial institutions and electronic payments users. *See id.* § 1693b(a). Here, that impact would be severe. For example, severely below-cost fee caps would force issuers to impose or increase fees for basic banking services, potentially resulting in many low-income Americans losing access to the banking system. *See* TCH et al. Comment Letter 43-44 (Feb. 22, 2011). Moreover, if issuers cannot account for transaction fraud risk by charging higher interchange fees for higher-cost transactions, as Regulation II now allows, issuers will likely be forced to make debit cards unavailable for such high-risk transactions (*e.g.*, transactions above certain threshold amounts, online purchases). *See id.* at 44.

The Board also has complicated issues left to address on any interim network exclusivity rule. This Court's decision explicitly leaves open several options for the Board to comply with the Court's construction of the statute. *See NACS v. Bd. of Governors of Fed. Reserve Sys.*, 2013 WL 3943489, at *25 (D.D.C. July 31, 2013). Before issuing any interim rule, the Board needs to study the feasibility and advisability of different approaches, expose one or more to public

comment, and select one. Given the many complex rulemaking questions remaining here, "judicial imposition of an overly hasty timetable" for an interim rule "would ill serve the public interest." *United Steelworkers of Am. v. Rubber Mfrs. Ass'n*, 783 F.2d 1117, 1120 (D.C. Cir. 1986).[2]

Second, an order requiring an interim rule would also impose substantial burdens on the payments industry. If the Board were to issue a new fee rule, the networks would need to plan new rate schedules and develop accompanying technical implementation requirements, issuers and acquirers in response would need to plan and implement the necessary changes, and all parties would need to test the interoperability of their systems for stability and accuracy. Requiring these extensive undertakings as part of a likely temporary rule (*i.e.*, an "interim" rule) would impose an unnecessary additional round of costs and burdens. All parties would likely incur the costs and burdens again if the D.C. Circuit reverses this Court or otherwise rules differently or if the Board were to issue a changed final rule based on comments received after promulgation of an interim rule. Moreover, rushing the implementation of new rules could threaten the effective functioning, stability, and security of the electronic payments system. That system processes over 46 billion transactions per year (*i.e.*, over 5 million transactions every hour),[3] so any changes must be well-planned, well-tested, and well-implemented if the smooth functioning and reliability of the system—upon which consumers and merchants have come to rely—are not to be compromised.

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[2] Yet another problem, expressed by the Board in its consent motion for stay pending appeal, is that the promulgation of an interim rule might vitiate the Board's appeal. *See* Def. Consent Mot. for Stay 7-8 (Aug. 26, 2013), ECF 42.

[3] *See* Board of Governors of the Federal Reserve System, *2011 Interchange Fee Revenue, Covered Issuer Costs, and Covered Issuer and Merchant Fraud Losses Related to Debit Card Transactions* 2 (2013), *available at* http://www.federalreserve.gov/paymentsystems/files/debitfees_costs_2011.pdf.

The complexity, costs, and burdens of implementing an interim rule are exponentially greater when it comes to a new network exclusivity rule that would comply with this Court's decision. As the Board recognized during the Regulation II rulemaking, because existing technology could not support the routing of signature transactions over multiple networks, the Board's proposed Alternative B (requiring two unaffiliated networks for each form of authorization) would have required massive change from all players in the payments system, including merchants:

> [T]he Board understands that enabling the ability to process a debit card transaction over multiple signature debit networks may not be feasible in the near term. Specifically, enabling multiple signature debit networks on a debit card could require the replacement or reprogramming of millions of merchant terminals as well as substantial changes to software and hardware for networks, issuers, acquirers, and processors in order to build the necessary systems capability to support multiple signature debit networks for a particular debit card transaction.

75 Fed. Reg. at 81,749. The technology required to satisfy this Court's decision does not exist—neither for routing of signature transactions over multiple signature networks nor for cross-routing of dual-message signature transactions over single-message PIN networks. Developing and implementing the technological solutions necessary to satisfy this Court's decision would alone raise a long list of complex challenges. Compliance with any network exclusivity rule along the lines of the Board's original Alternative B would also require extensive commercial negotiations, as issuers would need to seek out and select new network partners.

Given all the serious challenges described above, *amici* respectfully submit that the costs and burdens of any new interchange fee and network exclusivity rule should be imposed only once, after the appellate process settles the correct interpretation of the Durbin Amendment.

III. An Order Requiring The Board To Issue An Interim Or Expedited Rule Would Likely Precipitate Further Litigation

Finally, any order requiring the Board to issue an interim or expedited rule would almost certainly lead to further litigation, muddying the regulatory landscape in an area where the affected parties need sure guidance. *First*, such an order could lead to an immediate appeal by the Board based on the case law discussed, *supra*, in Part I. *Second*, even if the Board did not appeal any such order, and instead rushed an interim rule into place, that rule would likely precipitate further litigation by one or more issuers. As explained at the summary judgment stage, *amici* agree that the Board erred in Regulation II, but for reasons diametrically opposed to those advanced by Plaintiffs. While issuers have refrained from their own litigation against the Board over the current rule, were the Board to issue an interim rule that cut interchange fees even further below cost—and deprived issuers of the ability to recover the vast majority of their costs of running a debit card business—issuers likely could not stand idly by. Such litigation by issuers could prove unnecessary, however, if the D.C. Circuit is permitted to rule first and reverses this Court's ruling. And, even if the D.C. Circuit were to affirm this Court's decision, allowing that court to rule first—before the issuance of any new rule—would ensure that any and all potential issues with current or future versions of Regulation II are raised and addressed in an orderly and sequential process, rather than in potentially parallel, dueling lawsuits, one of which concerns a rule with only "interim" status.

CONCLUSION

For the foregoing reasons, this Court cannot, and should not, require the Board to issue an interim or expedited rule.

Respectfully submitted,

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