IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NACS, NATIONAL RETAIL FEDERATION, FOOD MARKETING INSTITUTE, MILLER OIL CO., INC., BOSCOV'S DEPARTMENT STORE, LLC, and NATIONAL RESTAURANT ASSOCIATION,

Plaintiffs,

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,

Defendant.

Case No. 1:11-cv-02075 (RJL)

DEFENDANT'S CONSENT MOTION FOR A STAY PENDING APPEAL

Defendant, the Board of Governors of the Federal Reserve System ("Board"), hereby moves with plaintiffs' consent for a stay of the Court's July 31, 2013 Memorandum Opinion and Order vacating the Board's interchange transaction fee (12 C.F.R. § 235.3(b)) and network non-exclusivity (12 C.F.R. § 235.7(a)(2)) regulations pending the D.C. Circuit's final resolution of all issues raised in the Board's appeal.

In support of this motion, the Board respectfully refers the Court to the accompanying Memorandum of Law in Support of Consent Motion for a Stay Pending Appeal. A proposed Order consistent with this Motion is filed herewith.

Dated: August 26, 2013
Washington, D.C.

Respectfully submitted,

/s/ Yvonne F. Mizusawa

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DEFENDANT BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM'S MEMORANDUM OF LAW IN SUPPORT OF CONSENT MOTION FOR A STAY PENDING APPEAL

Defendant, the Board of Governors of the Federal Reserve System ("Board"), has filed a notice of appeal of the Court's July 31, 2013 Memorandum Opinion (Dkt. # 38) and Order (Dkt. # 39), and respectfully submits this memorandum of law in support of its motion to stay the court's vacatur Order pending appeal. The plaintiffs have informed defendant that they support a stay pending appeal on the condition, to which the Board has agreed, that the Board seek expedited appeal in the D.C. Circuit.

The Order grants plaintiffs' March 2, 2012 Motion for Summary Judgment (Dkt. # 20), and denies the Board's April 13, 2012 Motion for Summary Judgment (Dkt. # 23), in this action arising under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), and the Declaratory Judgment Act, 28 U.S.C. § 2201. The Memorandum Opinion states that the Court will vacate those portions of the Board's Final Rule regarding Debit Card Interchange Fees and Routing, 76

Fed. Reg. 43,394 (July 20, 2011) (codified at 12 C.F.R. §§ 235.1-235.10) (the "Rule"), that concern the interchange transaction fee (12 C.F.R. § 235.3(b)) and network non-exclusivity (12 C.F.R. § 235.7(a)(2)), and remand to the Board for further proceedings consistent with the Memorandum Opinion. *See id.* at 57-58. In the Memorandum Opinion, the Court held that it would "stay vacatur … to provide the Board an opportunity to replace invalid portions of the Final Rule." *Id.* at 56-57. On August 21, 2013, the Court entered a minute order extending the stay pending the Court's consideration of this Motion.

On August 21, 2013, the Board filed a notice of appeal of the Memorandum Opinion and Order to the United States Court of Appeals for the District of Columbia Circuit. The Board intends to move to expedite the appeal. Accordingly, the Board now moves for a stay of vacatur pending the D.C. Circuit's final resolution of all issues raised in the Board's appeal.

As described below, the balance of the equities favors maintaining the status quo during the Board's appeal and the Memorandum Opinion and Order raise serious legal issues going to the merits. Accordingly, a stay of vacatur pending appeal is the appropriate remedy. *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843-44 (D.C. Cir. 1977); *Citizens Coal Council v. Babbitt*, No. 00-0274, 2002 U.S. Dist. LEXIS 26462, at *4 (D.D.C. June 5, 2002).

THE BOARD MEETS THE TEST REQUIRED FOR ENTRY OF A STAY PENDING APPEAL

In considering a motion for a stay pending appeal in the D.C. Circuit, the courts look to the following factors: (1) whether the applicant has made a strong showing that it is likely to succeed on the merits of the appeal; (2) the likelihood that the movant will be irreparably harmed absent a stay; (3) the prospect of substantial injury to the party opposing the stay if the court grants the stay; and (4) the public interest in granting the stay. *Nken v. Holder*, 556 U.S. 418, 426 (2009); *WMATC*, 559 F.2d at 843; *Loving v. IRS,* 920 F. Supp. 2d 108, 110 (D.D.C. 2013).

These factors are not prerequisites to be met, but rather considerations to be balanced. To justify a stay, "'it is not necessary that the [movant's] right to a final decision … be absolutely certain [or] wholly without doubt.'" *WMATC*, 559 F.2d at 844 (quoting *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 740 (2d Cir. 1953)). "'If the other elements are present … it will ordinarily be enough that the [movant] has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation.'" *Id.* (quoting *Charlie's Girls, Inc. v. Revlon, Inc.*, 483 F.2d 953, 954 (2d Cir. 1973) (*per curiam*)); *see also Loving,* 920 F. Supp. 2d at 110 ("so long as the other factors strongly favor a stay, such a remedy is appropriate if 'a serious legal question is presented'") (quoting *CREW v. Office of Admin.*, 593 F. Supp. 2d 156, 160 (D.D.C. 2009)).

Where the movant has established substantial irreparable harm and the balance of harms weighs heavily in favor of a stay, it need only raise "'serious legal questions going to the merits'" to obtain a stay pending appeal. *Population Inst. v. McPherson*, 797 F.2d 1062, 1078 (D.C. Cir. 1986) (quoting *WMATC*, 559 F.2d at 844). District courts "may properly stay their own orders when they have ruled on an admittedly difficult legal questions and when the equities of the case suggest that the status quo should be maintained." *WMATC*, 559 F.2d at 844-45; *see*

also Citizens Coal, 2002 U.S. LEXIS 26462, at *2 (staying order vacating Interior Department rule pending appeal where the case "raises a serious legal question and the balance of equities favors maintaining the status quo during appeal").

A. The Board, Plaintiffs, and Others Will Suffer Irreparable Harm in the Absence of a Stay

Here, there can be little question that any order vacating the Rule while an appeal is pending will irreparably harm the Board, the plaintiffs, and participants in the debit card industry. Indeed, this is apparent from the Memorandum Opinion and plaintiffs' consent to the stay. Both regulations challenged in this case were issued pursuant to section 920 of the Electronic Fund Transfer Act (15 U.S.C. § 1693o-2) ("EFTA"), as amended by section 1075 of the Dodd Frank Act ("Section 920"). These statutory provisions require the issuance of regulations by the Board in order to effectuate the limitations the statute seeks to impose. Thus, if the regulations here were vacated by the district court, there would be no legally binding standards for determining the permissible amount of interchange fees an issuer could receive with respect to a debit card transaction and no limitations on exclusive routing restrictions imposed by issuers and payment networks on debit card transactions. Such a lack of restrictions would plainly frustrate the will of Congress and harm the Board, the plaintiffs, and the public.

A court order vacating a rule often has the effect of "'reinstat[ing] the rules previously in force'" while the agency conducts additional rulemaking consistent with the court's decision. *AFL-CIO v. Chao*, 496 F. Supp. 2d 76, 83 (D.D.C. 2007) (quoting *Action on Smoking and Health v. Civil Aeronautics Bd.*, 713 F.2d 795, 797 (D.C. Cir. 1983)). Here, however, there are no prior rules to reinstate because the Board's Rule for the first time capped interchange fees for debit card transactions and placed restrictions on network exclusivity arrangements. Unless stayed, an order vacating the Rule would leave the industry in a largely unregulated state subject only to

those portions of the Rule remaining in effect and the broad proscriptions of section 920(a)(2), which are not self-effectuating. Moreover, the statute does not authorize merchants, consumers or others to enforce the statute through private rights of action. 15 U.S.C. § 1693o-2(d) ("[c]ompliance with the requirements imposed under this section shall be enforced under section 1693o [administrative enforcement] of this title" and "[s]ection[] 1693m [private right of action] . . . of this title shall not apply . . ."). Thus, here, as in *Citizens Coal*, a stay of vacatur pending appeal is necessary because participants in the debit card industry would "face substantial uncertainty while the appeal is pending because there is no prior rule to be reinstated." 2002 U.S. LEXIS 26462, at **2-3.

As the Court recognized in its Memorandum Opinion, "interchange and network fees are critical components of the debit card system, and … the Board's final rule has been in effect since October 1, 2011, such that regulated interests have already made extensive commitments in reliance on it." *Id.* at 56. The Court held that "any disruptive effect of vacatur can be curtailed by a stay." *Id.* The same reasoning applies to a stay pending appeal. Pending the D.C. Circuit's review of the Memorandum Opinion and Order, a stay is necessary to preserve the status quo ante and to avoid the disruptive effects of vacatur to participants in the debit card industry who have acted in reliance on the Rule for the past two years.

The plaintiffs would also suffer irreparable harm should vacatur not be stayed pending appeal.[1] As explained above, in the absence of a stay, section 235.3(b) of the Rule, which caps interchange fees at 21¢ plus the *ad valorem* component, would cease to exist, and there would be no cap on the interchange fees set by the networks. Given that interchange fee amounts prior to issuance of section 235.3(b) substantially exceeded the amounts prescribed in that Rule,

[1] We understand that the plaintiffs will be making a separate filing supporting the request for a stay pending appeal.

plaintiffs would then very likely face the possibility of a steep increase in interchange fees while the D.C. Circuit acts on the Board's appeal. The harm to the plaintiffs from increased fees would be irreparable, because plaintiffs would likely be unable to recover, in a later-enacted rule or otherwise, any interchange fee increases. *See Allied Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 151 (D.C. Cir. 1993) (noting that the consequences of vacating a rule "may be quite disruptive" among other reasons because petitioners "would be unable to recover those fees under a later-enacted rule") (citing *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208-09 (1988) (rejecting retroactive application of rules even if operating only to cure defects in a previously adopted rule)).[2]

Similarly, the failure to stay the Court's Order regarding the network non-exclusivity provision could irreparably harm the plaintiffs because vacating the Rule would eliminate any

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[2] We are unaware of any legal theory under which merchants could recover from issuers any amounts allegedly overpaid in interchange fees should the fees they currently pay consistent with the Board's Rule be reduced in a subsequent rule, or if they were to pay increased amounts during any period in which the Rule is vacated. As noted above, the civil liability provision of the EFTA, 15 U.S.C. § 1693m, is inapplicable to violations of Section 920, which provides only for administrative enforcement. 15 U.S.C. § 1693o-2(d). For issuing banks subject to the authority of the Federal Reserve and other Federal banking regulators, section 918 of the EFTA, 15 U.S.C. § 1693o, provides that the agencies have enforcement authority under section 8 of the Federal Deposit Insurance Act, 12 U.S.C. § 1818, which in turn authorizes the agencies to order restitution only if the respondent institution "is engaging or has engaged … in an unsafe or unsound practice [or] is violating or has violated . . . a law, rule, or regulation . . . ." 12 U.S.C. § 1818(b), and the agency finds that the bank was "unjustly enriched" in connection with such a violation or that the violation involved "reckless disregard for the law" or applicable regulations. 12 U.S.C. § 1818(b)(6)(A). A bank that complies with the Rule by charging no more than 21 cents plus the *ad valorem* component would not be subject to such an enforcement action, if for no other reason than it would not have "violated … a rule." If fees should rise during a period in which no cap exists due to this Court's vacatur, an agency seeking to take enforcement action would have to establish a "violation of law," which, in the absence of a rule setting forth a standard for determining what is "reasonable and proportional to cost," would require an ad hoc determination by the enforcing agency unmoored from the factors the Board is required to consider in rulemaking. In any event, initiating such an enforcement action would remain within the agency's sole prosecutorial discretion and could not be directed by a court. *Inv. Co. Inst. v. Fed. Deposit Ins. Corp.*, 728 F.2d 518, 526-27 (D.C. Cir. 1984).

requirement that debit cards be enabled with at least two unaffiliated payment card networks, *see* 15 U.S.C. § 1693o-2(b)(1), conceivably causing unrecoverable pecuniary harm to merchants through decreased routing options that many merchants experienced prior to issuance of the Rule.[3]

Should the existing regulatory provisions be vacated while the Board's appeal is pending, and should the Board attempt to address the resulting lack of any binding restrictions on interchange fee amounts and network exclusivity by issuing a new rule consistent with this Court's ruling during the appeal period, the Board would suffer irreparable harm because such an action would "eviscerate" its appeal. *Center for Science in the Public Interest v. Regan*, 727 F.2d 1161, 1163 (D.C. Cir. 1984); *see also id.* at 1164 (because agency promulgated new rule during appeal period, the rule that was the subject matter of the appeal "no longer has any force, and the controversy surrounding it is moot"); *accord Humane Society of the United States v. Kempthorne*, 527 F.3d 181, 182 (D.C. Cir. 2008) (agency's action removing grey wolf from the endangered species list mooted its appeal of district court order enjoining lethal take of grey wolves); *Sannon v. United States*, 631 F.2d 1247, 1250-51 (5th Cir. 1980) (where INS promulgated regulations providing the protections sought by plaintiffs and ordered by the lower court, government's appeal was moot); *Shays v. Fed. Election Comm'n*, 340 F. Supp. 2d 39, 50 (D.D.C. 2004) (clarifying that district court remand order did not require agency to enact new

[3] The Court appeared to believe that the Board's Rule did nothing to assist merchants or enhance choice and competition. Memorandum Opinion at 50 ("It is clear that Congress intended to put an end to exclusivity agreements and increase merchants' choice among debit-processing networks, not restrict that choice or even preserve the status quo."). That is simply inaccurate. Prior to the Rule, issuers commonly offered a choice of only two affiliated networks (such as Visa and Interrlink, Visa's PIN network) or, in some cases, a single signature-based network. The Board's Rule for the first time required each card to be capable of authorizing transactions on two unaffiliated networks, affecting millions of cards, and it expressly prohibited network rules that inhibit merchants' ability to direct routing of a debit card transaction on any network that can process the transaction.

rules pending appeal because doing so could moot appeal). Thus, were the Board to issue a rule (including an "interim rule")[4] during the appeal period, its right to appeal would be irreparably lost. Staying vacatur pending the D.C. Circuit's decision on appeal is necessary to avoid such irreparable harm.

The issuance of a new replacement rule while the existing Rule was being considered by the appeals court would also cause substantial harm to industry participants. Issuers, networks, and merchants would have to begin changing their systems in order to comply with the new rule, for example, by reconstructing existing routing arrangements, but these changes would have to be dismantled if the existing regulations are upheld on appeal or if the Court of Appeals were to interpret the statute to impose a different outcome than the district court. Such costs could not be recovered.

B. <u>There Are Serious Legal Questions on the Merits</u>

Here, whether the Board correctly interpreted the statutory language of section 920 in promulgating the Rule raises "'serious legal questions going to the merits.'" *WMATC*, 559 F.2d at 844. Section 920 is a complex statute raising a variety of issues as to its proper interpretation. With respect both to the network exclusivity provisions and the fee standard provisions of the Rule, there are strong arguments that the Board's interpretation of the statute is entitled to

[4] As will be discussed more fully in the Board's upcoming brief on interim rules, the Administrative Procedure Act (APA) does not recognize a separate category of "interim final rules." Rather, the APA permits an agency, under certain circumstances, to issue a final rule without the notice and comment that is normally a required part of agency rulemaking. 5 U.S.C. § 553(b)(B). Although the rules issued under the APA exception permitting omission of notice and comment have the force of law when issued, frequently these rules are issued along with a request for subsequent comment, with the agency contemplating that it will issue a "final" final rule in the future. Sometimes the agency does follow up with a revised rule but at other times the so-called "interim final rule" remains in place indefinitely. *See generally* Michael Asimow, *Interim-Final Rules: Making Haste Slowly*, 51 Admin. L. Rev. 703 (1999).

deference under *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), and its progeny.

1. Network exclusivity.

Section 920(b)(1)(A) by its terms requires the Board to "prescribe regulations providing that *an issuer or payment card network shall not . . . restrict* the number of payment card networks on which an electronic debit card transaction may be processed" to less than two unaffiliated networks (emphasis added). The Court determined that the Board's interpretation of this provision, which prohibits issuers or networks from restricting networks available on a card to fewer than two unaffiliated networks but does not require that in every case each transaction be capable of running over more than one network, is contrary to the "clear, defined language" of the statute, which, it held, "supports the conclusion that Congress intended for each transaction to be routed over at least two competing networks for each authorization method." Memorandum Opinion at 49, 54.

The language of the statute, however, does not require that reading. It is directed by its terms at eliminating restrictions imposed by an issuer or payment card network. Thus, contrary to the Court's opinion, the Board's Rule fully comports with the literal language of the statute for each electronic debit card transaction as defined by the statute. For a transaction using a debit card that enables only PIN authentication methods (or only signature authentication methods), the Rule prohibits issuers and networks from restricting routing to fewer than two unaffiliated PIN-based (or signature-based) networks. Where a transaction involves a debit card that can be authenticated through either signature or PIN methods, the Rule prohibits issuers and networks from restricting routing to fewer than two unaffiliated networks, one of which may be signature-based and one of which may be PIN-based. If in any given transaction involving a card with

dual authentication methods, a particular merchant's routing options are restricted because of a limitation that the merchant has imposed on itself -- for example, by choosing not to use the PIN authentication infrastructure -- or because of a choice made by the consumer, that reduced optionality is not the result of any restriction on routing imposed by the card issuer or by the network, which is all that the statute directs the Board's Rule to regulate.[5]

Consistent with this view, the actual language of the network exclusivity provisions in Section 920 contain no reference to methods by which a transaction may be authenticated. The Court reached its decision in part by re-writing the statutory provision substituting definitional language for the language of the provision itself. Thus, because the phrase "electronic debit transaction" is defined to mean "a transaction in which a person uses a debit card," and a "debit card" is defined as "any card . . . issued or approved for use through a payment card network to debit an asset account . . . whether authorization is based on signature, PIN, or other means," the Court concluded that the reference to "electronic debit transaction" in section 920(b)(1)(A) meant that each transaction, whether authorization is based on signature or PIN, must be able to be routed over at least two competing networks. Memorandum Opinion at 48-49. The actual language of section 920(b)(1)(A), however, contains no such requirement. Rather, as the Board pointed out, "the inclusion of 'whether authorization is based on signature, PIN or other means' in the definition of 'debit card' in section 920(c)(2)(A) is for the apparent purpose of capturing within that definition all cards that use a payment card network to debit an asset account, regardless of the method of authentication, including cards that enable only a single

[5] The Board's Rule, 12 C.F.R. § 235.7(a)(2), provides that the network non-exclusivity requirement is met only if each of the two unaffiliated networks does not, by rule or policy, restrict the operation of the network to a limited geographic area, specific merchant, or particular type of transaction, and if each network has taken steps reasonably designed to enable the network to process the electronic debit transactions that the network would reasonably expect will be routed to it, based on expected transaction volume.

authentication method (e.g. PIN-only cards)." Board's Reply Brief, filed June 1, 2012, at 2. Under the Board's Rule, networks and issuers may not limit the routing of transactions involving cards included within this definition to fewer than two unaffiliated networks. Read that way, section 920(b)(1)(A) means only exactly what it says: that the Board must prevent *issuers and networks* from restricting the number of networks over which a transaction may be processed to fewer than two networks. Nothing in that language unambiguously requires two or more networks per authentication method without regard to *merchant or consumer* choice, and the Board was thus authorized, under *Chevron*, to interpret it in a manner that would be faithful to the statutory purpose of preserving and enhancing competition, while taking account of practical realities and consumer protection goals that must inform the agency's choices.

The Court also gave undue weight to the floor statement of the bill's sponsor in determining that the statutory language was so unambiguous as to foreclose agency interpretive authority. "The remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history." *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979); *see also Nat'l Cable & Telecomms. Ass'n v. FCC*, 567 F.3d 659, 665 (D.C. Cir. 2009) ("the principal concern of one congressman [the sponsor in this case] helps little in locating the limits of the language chosen by all members of both houses"). As the D.C. Circuit noted in *Overseas Educ. Ass'n v. F.L.R.A.*, 876 F.2d 960, 975 (D.C. Cir. 1989), "[w]hile a sponsor's statements may reveal *his* understanding and intentions, they hardly provide definitive insights into *Congress'* understanding of the meaning of a particular provision. Thus members of Congress, in voting on a measure, must be presumed to have relied on the meaning of the words read in context on a printed page. Moreover, a statute's sponsor may well be pursuing a political agenda in his floor discussion that judges are ill-equipped to detect." (Italics in original.) Thus, Senator Durbin's

floor statement, while seemingly supportive of requiring that two unaffiliated networks be available for every transaction no matter what its method of authentication, cannot trump the plain language of the statute which does not require such a result.

Finally, the Board's construction of section 920(b)(1)(A) as not requiring two routing options for each method by which a debit card transaction could possibly be authenticated is fully consistent with the statute's objective of promoting fraud reduction through innovation in debit card authentication methods. As the Board noted, new methods of authentication involving biometrics or other new technologies may be more effective in reducing fraud. 76 Fed. Reg. 43,448. But these methods may face steep barriers to implementation if each transaction involving the new technology must from the beginning be capable of being processed over multiple unaffiliated payment methods.

2. <u>Interchange fee standard</u>.

Similarly, the Court erred in invalidating the interchange fee standard in the Board's Rule as inconsistent with the unambiguous terms of the statute. Contrary to the Court's decision, the relevant statutory language, applying the basic rules of statutory construction, plainly supports a reading given to it by the Board: that in setting the standard for interchange fees, the Board may consider costs that are in neither of the two categories specifically delineated in the statute, those that must be considered and those that may not be considered.

The decision ignores the fact that the controlling test set out in the statute for permissible fees, and the statute's express direction to the Board in prescribing regulations, is that interchange transaction fees received by an issuer must be "reasonable and proportional to the cost incurred by the issuer with respect to the transaction." §1693o-2(a)(2), (3)(A). These provisions by their terms allow issuers to receive fees with respect to a debit card transaction

provided that they are reasonable and proportional to the cost of the transaction, and direct the Board to establish standards ensuring that the fees received are reasonable and proportional to that cost. The provisions contain no language qualifying the specific types of transaction costs incurred by the issuer that may be recovered through interchange fees.

To be sure, section 920(a)(4)(B) provides some guidance to the Board regarding its calculation of fees that are "reasonable and proportional" to cost by directing the Board to consider some costs and forbidding it from considering others. Specifically, the statute requires that the Board consider "the incremental cost incurred by the issuer for the role of the issuer in the authorization, clearance, or settlement of a particular electronic debit transaction." §1693o-2(a)(4)(B)(i). However, the counterpart provision, identifying those costs "which shall not be considered," expressly employs different language: "other costs incurred by an issuer which are not specific to a particular electronic debit transaction." §1693o-2(a)(4)(B)(ii). Under the ordinary rules of statutory construction, it is presumed that the use of different words in the prohibited costs clause means that Congress intended a different meaning from the terminology used in the clause on costs that must be considered. *Russello v. United States,* 464 U.S. 16, 23 (1983) ("'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'") (citations omitted); *Mary Jo C. v. New York State and Local Ret. Sys.*, 707 F.3d 144, 156 (2d Cir. 2013) ("where, as here, Congress uses certain language in one part of the statute and different language in another, the court presumes different meanings were intended"). Moreover, in concluding that the phrase "which are not specific to a particular electronic debit transaction" is purely descriptive and does not limit the scope of other costs that may not be considered, the district court ignored another accepted

precept of statutory construction: every word in a statute is presumed to have meaning and is not mere surplusage. *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (citing *Duncan v. Walker*, 533 U.S. 167, 174 (2001); *United States v. Menashe*, 348 U.S. 528 (1955); and *Montclair v. Ramsdell*, 107 U.S. 147 (1883)).

Had Congress meant that the *only* costs that could be considered in calculating what was "reasonable and proportional" to costs were the "incremental" costs identified in section 920(a)(4)(B)(i), there are any number of ways it could have said so: it could have written section 920(a)(4)(B)(ii) as simply excluding "all other costs;" it could have written section 920(a)(4)(B)(i) to say "consider *only* the incremental cost incurred" for authorization, clearance, or settlement and eliminated section 920(a)(4)(B)(ii) altogether; or it could have provided in section 920(a)(2) and (3)(A) that issuers were limited to costs that were "reasonable and proportional to the incremental cost incurred by the issuer in authorization, clearance, or settlement of a transaction," to name a few obvious possibilities. Congress chose none of these constructions, but the Court determined that the language it chose meant that the Board was limited, in its consideration of costs, to those incremental costs that fit into the category described in section 920(a)(4)(B)(i). This ignores not only the non-parallel words of section 920(a)(4)(B)(ii), but the structure of the statute itself, with its overall direction to cap fees at an amount that is "reasonable and proportional" to cost.

For the reasons stated above, in light of the express terminology used in the statute relating to the Board's obligations in setting standards for interchange fee amounts, the district court's reliance on the floor statements of Senator Durbin with respect to the costs that must be considered by the Board was misplaced, and such remarks should not be used to override the actual words enacted by the legislature.

Given the reasonable alternative construction offered by the Board, there are serious questions for appeal regarding whether the statutory language "unambiguously forecloses the [Board's] interpretation," as the Court concluded, or whether the Board's interpretation was instead entitled to *Chevron* deference. *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 983 (2005); *Nat'l Cable & Telecomm. Ass'n v. FCC*, 567 F.3d at 663. As shown above and as the Board will demonstrate on appeal, the Board's construction is not only plausible but is the best reading using all traditional tools of statutory construction including the text, structure, and purpose of the statute. *Nat'l Cable & Telecomm. Ass'n v. FCC*, 567 F.3d at 663.

Likewise, the Memorandum Opinion raises serious questions on the merits regarding whether the Court should have proceeded to *Chevron* Step Two, which is "'highly deferential'" to the agency. *Cablevision Sys. v. FCC*, 649 F.3d 695, 709 (D.C. Cir. 2011). Under established Supreme Court and D.C. Circuit precedent, unless the Board's construction is "unambiguously foreclosed" by Section 920, the Court must defer to the Board's reading, even if other constructions are possible. *Brand X Internet Servs.*, 545 U.S. 967, 980, 982-83; *Gentiva Healthcare Corp. v. Sebelius*, No. 12-5179, 2013 U.S. App. LEXIS 14886, at *8 (D.C. Cir. July 23, 2013). Even assuming that the Memorandum Opinion describes a plausible construction of the statute, this case raises serious issues for consideration on appeal regarding whether the Court erred in determining that its reading is the only possible construction of the statute and in failing to proceed to the *Chevron* Step Two analysis.

C. The Plaintiff Will Not Suffer Irreparable Harm if a Stay is Granted

The traditional test for a stay pending appeal looks to whether there will be harm to the party opposing the stay. *Nken v. Holder*, 556 U.S. at 426. Here, there is no party opposing a stay, because both the Board and the plaintiffs favor entry of a stay of vacatur pending appeal. As described above, the plaintiffs face a risk of irreparable harm should the rule be vacated pending appeal. Accordingly, the third factor weighs heavily in favor of a stay.

D. The Public Interest Favors a Stay

Finally, the public interest favors a stay. Section 920(a)(2) of EFTA requires that the amount of interchange transaction fee be "reasonable and proportional" to the cost incurred by the issuer with respect to the transaction. 15 U.S.C. § 1693o-2(a)(2). Pending the D.C. Circuit's ruling on whether or not the Board properly interpreted the statutory language, section 235.3(b) of the Rule caps interchange fees at approximately half of the pre-Rule average of 44 cents per transaction. 76 Fed. Reg. at 43,397. In the absence of the Board's Rule, there would be no formal guidance in place as to the amount at which the fees must be capped. In addition, the Board has required that at least two unaffiliated payment card networks be enabled on each debit card. This requirement is entirely dependent upon the Board's Rule, *see* 15 U.S.C. § 1693o-2(b)(1), and reversion to the pre-Rule status quo—in which network exclusivity was permitted—would be contrary to the public interest that is embodied in Section 920. The Court has recognized the significant harms that could befall not only the plaintiffs but the debit card industry should the Rule be abruptly vacated without a stay. Memorandum Opinion at 56. Accordingly, the public interest is coextensive with the Board's interest in that the harms the Board is seeking to prevent inure to the benefit of participants in the debit card industry as a

whole. In sum, the balance of harms clearly weighs in favor of a stay of vacatur pending resolution of the Board's appeal.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court grant its motion for a stay of vacatur pending the D.C. Circuit's final resolution of all issues raised in the Board's appeal.

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