

## Lawsuit Challenges Constitutionality of Debit Card Interchange Provisions of Dodd-Frank Act

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TCF National Bank (TCF) has filed a suit in the United States District Court in South Dakota challenging the constitutionality of Section 1075 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (known as the Durbin Amendment). The Durbin Amendment authorizes the Federal Reserve to implement regulations governing payment card transactions in the areas of (1) debit interchange fees, (2) payment card minimum and maximum purchase prohibitions, and (3) debit payment network exclusivity.

TCF's lawsuit challenges the constitutionality of the debit interchange fee regulation on three grounds: (1) that by limiting fees to below the actual cost to produce the services, the government is taking property without just compensation; (2) violation of due process related to Congressional approval of the Durbin Amendment and the absence of public hearings; and (3) violation of equal protection, because the Durbin Amendment expressly applies only to issuers with \$10 billion or more in assets, thus leaving unaffected (and potentially advantaged) approximately 99% of U.S. banks.

The Durbin Amendment provides that interchange rates for electronic debit transactions must be "reasonable and proportionate" to the actual processing costs incurred by the issuer, taking into account only the incremental costs of authorizing, clearing and settling electronic debit transactions, but *not* other costs incurred by an issuer which are not specific to a particular debit transaction. Under the Durbin Amendment, the Board of Governors of the Federal Reserve is tasked with drafting regulations designed to implement the reasonableness and proportionality requirements for debit transaction interchange fees by April 21, 2011. The debit transaction interchange regulations implemented by the Federal Reserve will not apply to card issuers with assets of less than \$10 billion.

Under TCF's theory of the case, the Durbin Amendment directs the Federal Reserve to consider only some of the costs involved in processing debit transactions when determining permissible debit interchange fees. TCF claims that, by limiting debit interchange fees so that larger banks are necessarily losing money on debit transactions, the Durbin Amendment results in an unconstitutional taking because the larger banks cannot, as a practical matter, charge additional fees to checking customers for debit transactions without driving off those customers. TCF's view is that, given current market conditions and bank customers' expectations that debit cards associated with traditional checking accounts will be provided on a no-fee basis, imposing fees to recoup the difference between the bank's cost of providing the debit service and the amount received in interchange will cause those customers to close their accounts and move them to banks that offer no-fee debit cards with their checking accounts presumably smaller banks that are not subject to the Durbin Amendment.

In its complaint, TCF compared its need to recover more than the limited set of permissible debit interchange costs to a familiar fast food business:

Just as Burger King must price its hamburger to recover all its costs – like advertising, building, and labor – not just the cost of the burger and bun – a bank must recover the entire economic cost of its debit service, which, up until the Durbin Amendment, all debit

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card issuing banks have done through interchange fees collected from retailers. The Durbin Amendment allows regulated banks, so to speak, to recover only the cost of the bun.

(TCF Compl. ¶ 35.)

TCF stated that it has elected not to join with other banks or banking trade associations as plaintiffs in order to expedite the litigation process but is currently talking to several banks about joining the suit or filing amicus briefs supporting TCF's position. The suit seeks a preliminary injunction to prevent enforcement of the Durbin Amendment and requests the court to declare the Durbin Amendment unconstitutional and void.



*If you have any questions about this development, please feel free to contact the attorneys listed below or the Sutherland attorney with whom you regularly work.*

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