RICHARD J. DURBIN
ILLINOIS
MAJORITY WHIP

United States Senate

WASHINGTON, DC 20510-1304

COMMITTEE ON AGRICULTURE, NUTRITION, AND FORESTRY
COMMITTEE ON APPROPRIATIONS
COMMITTEE ON THE JUDICIARY

November 22, 2024

Michael J. Hsu
Acting Comptroller of the Currency
Office of the Comptroller of the Currency
400 7th St. SW
Washington, DC 20219

Dear Acting Comptroller Hsu:

I write to seek clarification of the Office of the Comptroller of the Currency's (OCC) understanding of interchange fees in light of the OCC's recent amicus brief filed in *Illinois Bankers Association v Raoul*.[1] I am concerned that the OCC may be misinterpreting basic elements of these fees, which is particularly troubling given the OCC's statutory role to enforce national banks' compliance with debit interchange fee regulation under the Durbin Amendment. This is not the first time I have expressed these concerns; I previously wrote then-Acting Comptroller of the Currency John Walsh in 2011 regarding comments the OCC had made about the Durbin Amendment that either misunderstood or misrepresented the law. I urge the OCC to issue clarifications to reassure the public that it understands both the facts and the law with respect to these fees.

The U.S. interchange fee system is a broken market in which dominant network companies like Visa and Mastercard price-fix fee rates on behalf of thousands of financial institutions, stifling competitors and imposing excessively high fees that ultimately inflate consumer prices. In 2010, Congress passed the Durbin Amendment, which reined in certain network-fixed interchange fees and promoted network competition in the debit card industry. Now, states are passing sensible reforms to address market failures and high interchange fees. In June 2024, the Illinois State Legislature passed and Illinois Governor JB Pritzker signed into law the Interchange Fee Prohibition Act (IFPA), which prohibits charging interchange fees on the tax and tip portions of a transaction. The IFPA aims to reduce the excessively high interchange fees that merchants pay and ultimately are passed to consumers.

The OCC either misunderstands or misstates how interchange fees work in its amicus brief in support of several banking associations' lawsuit opposing the IFPA. First, the OCC has claimed that the IFPA represents a state incursion into "national banks' authority to set fees for services rendered."[2] This is incorrect. As the OCC should know, banks do not set interchange fees. Instead, card networks establish interchange fees, and the fees then are received by card-issuing banks on credit and debit card transactions.[3] Centralized fee-fixing by card networks like Visa and Mastercard is structurally anti-competitive, as banks do not compete with one another over the fees they receive, and the OCC should be troubled by this collusive arrangement. At a

[1] *Illinois Bankers Association v. Raoul,* OCC amicus brief
[2] *Illinois Bankers Association v. Raoul,* OCC amicus brief, at p. 11.
[3] *Illinois Bankers Association v. Raoul*, Complaint, at p. 6.

711 HART SENATE OFFICE BUILDING
WASHINGTON, DC 20510-1304
(202) 224-2152

230 S. DEARBORN STREET
SUITE 3892
CHICAGO, IL 60604
(312) 353-4952

525 SOUTH EIGHTH STREET
SPRINGFIELD, IL 62703
(217) 492-4062

1504 THIRD AVENUE
SUITE 227
ROCK ISLAND, IL 61201
(309) 786-5173

250 W. CHERRY STREET
SUITE 115-D
CARBONDALE, IL 62901
(618) 351-1122

durbin.senate.gov

minimum, the OCC should clarify its inaccurate representation that interchange fees are set by banks.

Second, in its amicus brief the OCC claims "that national banks are authorized to charge [interchange fees] to merchants as part of the standard clearing and settlement process for debit and credit card transactions."[4] Again, this claim misunderstands or misstates how interchange fees work. The OCC Comptroller's Handbook for Merchant Processing, which the OCC brief cites as evidence for its claim, explicitly recognizes that card networks like Visa and Mastercard, not banks, set and charge interchange rates.[5] Likewise, while the OCC brief also claims that an OCC regulation (12 C.F.R. § 7.4002) specifically addresses national banks' fee authority,[6] that regulation states that interchange fees should be determined by each bank on a competitive basis.[7] However, interchange fees are established centrally by card network companies on behalf of banks, not on a competitive basis by each bank. Accordingly, the OCC should clarify and correct its misleading claim that it has "addressed the specific issue of interchange fees," because the sources it cites do not reflect how interchange fees actually work.

Third, the OCC claimed that the IFPA would "undermine the uniformity necessary for the smooth and effective functioning of the national payment system."[8] This reference to a singular "national payment system" is misleading. Neither the OCC Comptroller's Handbook for Payment Systems nor OCC regulations discuss a singular national payment system. Instead, credit and debit card transactions are conducted over a number of proprietary networks in which non-bank actors, such as card network companies and payments processors, play key roles. In practice, this marketplace is dominated by a handful of giant card network companies like Visa and Mastercard, which often operate their networks anticompetitively and stifle marketplace competition and innovation. This allows the giants in the market to maintain their dominance and impose interchange fee rates that are far higher than what a competitive market would bear. Such a landscape is far from a "national payment system," let alone a smooth and effective one, and it is inaccurate for the OCC to represent that there is an existing "national payment system" for which uniformity is necessary.

Finally, the OCC claimed that the IFPA's interchange fee restriction would "wreak havoc on the Nation's economy."[9] However, there is simply no factual basis to definitively claim that a restriction that moderately diminishes banks' interchange fee revenues by precluding the charging of interchange fees on taxes and tips would wreak such havoc in the future. In fact, if the OCC studied payments systems around the world, it would find that many countries enjoy secure, efficient payment systems with interchange fee rates that are a small fraction of those established by networks in the United States.

---

[4] OCC amicus brief at p. 8.
[5] *See e.g.*, OCC Comptroller's Handbook, Merchant Processing, August 2014, at p. 32 ("Bank card associations set interchange rates on a periodic basis") and p. 30 "([Settlement transmission] reports summarize the interchange rates charged by the bank card associations for each transaction.").
[6] OCC amicus brief at pp. 7-8.
[7] 12 C.F.R. § 7.4002(b)(1)-(2)
[8] OCC amicus brief at p. 2.
[9] *Id.* at p. 6.

The OCC's apparent misunderstandings or misstatements about interchange fees are particularly troubling because it enforces compliance of the debit interchange fee regulation under the Durbin Amendment for OCC-regulated national banks. Although other enforcement agencies, including the Federal Reserve,[10] Department of Justice,[11] and Federal Trade Commission,[12] have acted when banks and networks have sought to circumvent the Durbin Amendment's provisions, to my knowledge, the OCC has never taken any such enforcement action. The OCC's recent statements raise concerns that confusion about interchange fees may be the cause of the OCC's passivity when it comes to enforcing the Durbin Amendment, and perhaps such confusion also is animating the OCC's criticism of state efforts to pass reforms that are complementary of, and consistent with, congressional action to address interchange market failures.

I urge the OCC to clarify the above-mentioned claims and ensure that it is fully informed about interchange fees before publicly commenting on such fees in the future. Thank you for your attention to this important matter.

Sincerely,

Richard J. Durbin
United States Senator

cc: The Honorable Janet Yellen, Secretary, United States Department of the Treasury

[10] *See e.g.*, 87 Fed. Reg. 61217 et seq. (amending Regulation II after reports that card-issuing banks were not enabling at least two unaffiliated networks to process card-not-present debit transactions).
[11] *See e.g.*, Department of Justice press release, "Justice Department Sues Visa for Monopolizing Debit Markets," Sept. 24, 2024.
[12] *See e.g.*, Federal Trade Commission press release, "FTC Approves Final Order Requiring Mastercard to Stop Blocking the Use of Competing Debit Payment Networks," May 30, 2023.