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DEBIT CARD SWIPE FEES RULE

Last week, the Senate revisited an issue known as the “debit card swipe fee rule” and decided to leave the pending rule as is. Generally, retail merchants support the law and pending rule and banks and card processors do not.

For those of you who do not deal with such transactions as part of your business, the Dodd-Frank Wall Street Reform and Consumer Protection Act, enacted on July 21, 2010, included a section that requires, effective July 21, 2011, the amount of any interchange transaction fee that a debit card issuer receives or charges with respect to an electronic debit transaction must be reasonable and proportional to the cost incurred by the issuer with respect to the transaction. The Federal Reserve has issued a proposed rule on what constitutes a “reasonable” fee.

The Federal Reserve offered two alternative interchange fee standards that would apply to all covered issuers: one based on each issuer's costs, with a safe harbor (initially set at 7 cents per transaction) and a cap (initially set at 12 cents per transaction); and the

other a stand-alone cap (initially set at 12 cents per transaction).

Opponents of the rule have been running a campaign to convince Congress to delay the implementation of the law. Senator Jon Tester (D-MT) introduced S.57, the Debit Interchange Fee Study Act of 2011. Representative Shelley Moore Capito (R-WV) introduced H.R.1081, the Consumers Payment System Protection Act. Both bills are designed to delay implementation of the law.

Last week, Senator Tester and Senator Bob Corker (R-TN) offered an amendment to pending legislation that included the delay concept. They needed 60 votes for approval, they secured 54 votes.

REGULATORY REFORM

A couple weeks ago, we reported Senator Olympia Snowe's (R-ME) efforts to add an amendment to the then pending Small Business Innovation Research program reauthorization bill was blocked. Her amendment would make some useful and innovative changes to the Regulatory Flexibility Act (RFA) and the Small Business Regulatory Enforcement Fairness Act

(SBREFA). She tried again during the debate on an economic development bill (same one that was the forum for the swipe fee rule delay amendment debate). She needed 60 votes to proceed with the amendment. She got 53.

Her bill S. 1030, upon which the amendment is based, is called the Freedom from Restrictive Excessive Executive Demands and Onerous Mandates (FREEDOM) Act.

You may recall the basic elements of RFA and SBREFA are as follows.

The RFA, enacted in September 1980, requires agencies to consider the impact of their regulatory proposals on small entities, analyze effective alternatives that minimize small entity impacts, and make their analyses available for public comment. The RFA applies to a wide range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions.

SBREFA, enacted in March 1996, amended the RFA and provided additional tools to aid small business in the fight for regulatory fairness. The most significant

amendments made by SBREFA were:

- Judicial review of agency compliance with some of the RFA's provisions.
- Requirements for more detailed and substantive regulatory flexibility analyses.
- Expanded participation by small businesses in the development of rules by the Occupational Safety and Health Administration (OSHA) and the Environmental Protection Agency (EPA) by requiring those agencies to convene Small Business Advocacy Review panels composed of representatives from the agency, OMB's Office of Information and Regulatory Affairs (OIRA) and the Small Business Administration's (SBA) Chief Counsel for Advocacy. The panels must collect the advice and recommendations of representatives of affected small entities about the potential impact of the draft rule. (The recently passed Dodd-Frank financial reform law added the Consumer Financial Protection Bureau to the list of agencies that have to convene small business panels)

Senator Snowe's proposal would:

- *Require that agencies consider indirect economic impacts in small business analyses;
- *Enforce existing periodic rule review requirements and penalize agencies that refuse to conduct these reviews;
- *Add nine new small business review panels at federal agencies whose rules have the largest economic impact on small businesses (the Chief Counsel for Advocacy would get to choose which agencies, and coverage would be phased in over time);
- *Provide for judicial review at an earlier point in the federal rulemaking process; and
- *Extend the RFA to agency guidance documents, so that federal agencies must conduct small business economic analyses before publishing those documents. Recently, agencies have subverted the rulemaking process by relying on documents that agencies can issue without having to adhere to their RFA obligations.