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Payment Systems Advisory ■

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D.C. Circuit Court Upholds Federal Reserve Board Regulation II

District Court's Grant of Summary Judgment to Merchants Reversed; Classification of Transaction Monitoring Costs Remanded to Board for Further Explanation[1]

In an opinion released Friday, March 21,[2] the Court of Appeals for the D.C. Circuit reversed the D.C. District Court's grant of summary judgment in *NACS v. Board of Governors of the Federal Reserve System* ("***NACS v. Board***"),[3] the challenge filed by a group of merchant trade associations and individual merchants (the "Merchants") to the interchange-fee limitations and network exclusivity prohibition established by the Board of Governors of the Federal Reserve System (the "**Board**") in Regulation II, Debit Card Interchange Fees and Routing ("**Regulation II**").[4] The court of appeals upheld Regulation II as currently drafted, finding that the Board had reasonably interpreted the Durbin Amendment's[5] mandates, but the court remanded one "minor" issue to the Board for further explanation—the treatment of transaction monitoring costs.[6]

Regulation II's Interchange-Fee Limitations and Network-Exclusivity Prohibition

The Durbin Amendment requires interchange fees charged or received by issuers in conjunction with debit

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1 This advisory supplements our advisory regarding the district court's memorandum opinion (http://www.alston.com/advisories/NACS-v-Board/), our subsequent updates regarding the August 14 (http://www.alston.com/advisories/update-DC-district-court/) and August 21 (http://www.alston.com/advisories/federal-reserve-appeal-regulation/) status conferences and associated briefing, our advisory regarding the D.C. Circuit's grant of expedited review (http://www.alston.com/advisories/regulation-II-Review/), our advisory regarding the oral arguments held before the D.C. Circuit on January 17, 2014 (http://www.alston.com/publications/Oral-Argument-NACSvBoard/), and our prior alert regarding the D.C. Circuit's opinion (http://www.alston.com/advisories/nacs-v-board-II/).

2 *NACS v. Bd. of Governors of the Fed'l Res. Sys.*, No. 13-5270 (D.C. Cir. Mar. 21, 2014) (the "*Circuit Court Opinion*").

3 *NACS v. Bd. of Governors of the Fed'l Res. Sys.*, 958 F. Supp. 2d 85 (D.D.C. 2013) (the "*District Court Opinion*").

4 12 C.F.R. Part 235.

5 Electronic Fund Transfer Act, 15 U.S.C. § 16930-2, "Reasonable fees and rules for payment card transactions," referenced herein as the "Durbin Amendment."

6 *Circuit Court Opinion* at 3.

card transactions to be "reasonable and proportional" to the costs the issuer incurs in connection with such transactions.[7] The Durbin Amendment instructs the Board to issue rules to establish standards for assessing whether an interchange fee meets this standard. In so doing, the Durbin Amendment directs the Board to consider the "incremental cost incurred by an issuer for the role of the issuer in the authorization, clearance or settlement of a particular electronic debit transaction"[8] (referred to as "incremental ACS costs") and prohibits the Board from considering "other costs incurred by an issuer which are not specific to a particular electronic debit transaction."[9] The Durbin Amendment also permits the Board to allow for a separate adjustment to the established interchange-fee limitation to account for certain fraud-prevention costs incurred by issuers that meet fraud-prevention standards established by the Board.[10]

In developing the interchange-fee limitation set forth in Regulation II, the Board interpreted the Durbin Amendment as requiring the consideration of incremental ACS costs, prohibiting consideration of costs not specific to particular debit card transactions and permitting consideration of other costs that are "specific to a particular electronic debit transaction" (the "third category costs"). By the Board's reasoning, Congress only prohibited the Board from considering issuer costs that are "not specific to a particular electronic debit transaction" in its rulemaking. As a result, the interchange-fee limitation established by the Board in Regulation II accounted not only for incremental ACS costs, but also for the following third category costs: (i) certain fixed costs of authorization, clearing and settlement ("fixed ACS costs"), (ii) transaction monitoring costs, (iii) fraud losses and (iv) network fees. After conducting a rulemaking proceeding (which included a survey and analysis of issuer costs, as well as review of more than 10,000 public comments on the initial proposed Regulation II), the Board set the interchange-fee limitation at 21 cents per transaction, plus five basis points of transaction value.[11] The Board also allowed issuers that satisfy the fraud-prevention standards set out in Regulation II to receive an additional one-cent fraud-prevention adjustment per transaction.[12]

With respect to network exclusivity, the Durbin Amendment requires that the Board prohibit networks and issuers from restricting the networks on which a debit card transaction may be processed to fewer than two unaffiliated networks.[13] The Board construed this mandate as requiring only that two unaffiliated networks be enabled on each debit card regardless of the transaction authentication methods supported by the networks enabled on the card (i.e., enablement of any two unaffiliated networks on the card would satisfy the prohibition on network exclusivity, even if one network supported only signature-authenticated transactions and the other network supported only PIN-authenticated transactions).

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7 15 U.S.C. § 1693o-2(a)(3)(A).

8 15 U.S.C. § 1693o-2(a)(4)(B)(i).

9 *Id.* at (4)(B)(ii).

10 15 U.S.C. § 1693o-2(a)(5).

11 12 C.F.R. § 235.3(b).

12 12 C.F.R. § 253.4.

13 15 U.S.C. § 1693o-2(b)(1)(A).

The District Court Opinion

In *NACS v. Board*, the Merchants challenged two key determinations made by the Board in its Regulation II rulemaking. First, the Merchants challenged the Board's determination, in setting the interchange-fee limitation, that the Durbin Amendment permitted the Board to consider costs other than incremental ACS costs. Second, the Merchants challenged the Board's determination that the Durbin Amendment's prohibition on network exclusivity could be satisfied by requiring enablement of any two unaffiliated networks on a debit card, regardless of the authentication methods supported by the networks (e.g., enablement of one signature network and one unaffiliated PIN network). In a memorandum opinion issued on July 31, 2013, the district court agreed with the Merchants, stating that, in implementing the Durbin Amendment's interchange-fee limitation and network exclusivity prohibition through Regulation II, the Board "completely misunderstood" the intent of Congress.[14]

In reviewing challenges to agency regulations under the Administrative Procedure Act, courts apply the two-step analysis outlined by the Supreme Court in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*.[15] In "*Chevron* step one," the court must determine if the statutory text, together with relevant legislative history, clearly and unambiguously expresses the intent of Congress with respect to the question at issue. If the congressional intent is clear, then the agency has no latitude in its rulemaking beyond executing Congress's express intent. However, if the court finds that the intent of Congress with respect to a particular issue is not clearly expressed by the statute, the agency has discretion to interpret the statute through rulemaking and the agency's interpretation of the statutory directive will be upheld unless it is arbitrary, capricious or contrary to law ("*Chevron* step two").

The district court decided *NACS v. Board* as a "*Chevron* step one" case. The district court held that the statutory text, together with related legislative history, clearly and unambiguously expressed Congress's intent that the Board consider only incremental ACS costs in establishing the interchange-fee limitation. The court construed the Durbin Amendment as dividing all issuer debit transaction costs into two mutually exclusive, encompassing categories: incremental ACS costs (which the Board was required to consider) and all other costs (which the Board was prohibited from considering). Therefore, the district court found that by considering the third category costs in developing the interchange-fee limitation, the Board acted without statutory authority and in contravention of clear congressional intent.

With respect to the prohibition on network exclusivity, the district court held that the Durbin Amendment reflected Congress's clear direction that each debit card must be enabled on at least two unaffiliated networks for each method of transaction authentication supported by any network enabled on the card (i.e., for debit cards supporting both signature and PIN methods of transaction authentication, at least two unaffiliated networks enabled on the card would need to support signature-authenticated transactions and at least two unaffiliated networks enabled on the card would need to support PIN-authenticated transactions). Having found that Congress spoke clearly and unambiguously with respect to its intended means of implementing the prohibition on network exclusivity, the district court concluded that the Board exceeded the scope of

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[14] *District Court Opinion* at 114.

[15] 467 U.S. 837 (1984).

its authority under the Durbin Amendment by failing to require multiple unaffiliated routing options per authentication method for each debit transaction.

After determining, in each case, that the Board exceeded its statutory authority and contravened the clear intent of Congress, the district court concluded that the interchange-fee limitation and the network exclusivity prohibition in Regulation II were "fundamentally deficient" and "irredeemable."[16] The court determined that the only appropriate remedy was to grant the Merchants' summary judgment motion, vacate the specific provisions of Regulation II at issue and remand to the Board for development of regulations consistent with the Durbin Amendment.[17] Recognizing the disruptive effect of its ruling on regulated entities and their commercial relationships, the court stated that it would stay the vacatur of Regulation II in order to permit the Board to develop replacement regulations.

Oral Argument Before the Court of Appeals

On September 19, 2013, the court of appeals granted[18] the joint motion of the Board and the Merchants requesting expedited appeal of the district court's decision. Judges Tatel, Edwards and Williams heard oral argument on the case on January 17, 2014. From the outset, the court appeared to view the case as a *Chevron* step two case—indeed, during oral argument, Judge Edwards advised the Merchants' counsel to focus on *Chevron* step two arguments, stating that the Merchants were "not going to win on *Chevron* step one." The panel of judges focused most of its attention on the interchange-fee limitation, directing the parties away from any lengthy discussion about the network exclusivity prohibition and focusing particularly on two questions regarding the interchange-fee limitation: (i) how the Board decided which fixed costs it should include in setting the interchange fee standard and (ii) why the Board elected to separate transaction monitoring costs from fraud-prevention costs, given that Congress specifically directed that fraud-prevention costs should only be recoverable by issuers that meet certain standards prescribed by the Board.

The Appellate Court's Opinion

In an order and opinion filed March 21, 2014, the court of appeals overturned the district court's grant of summary judgment for the Merchants and upheld Regulation II as drafted, remanding to the Board only the issue of the classification of transaction monitoring costs. The court of appeals reviewed the Merchants' challenges to Regulation II de novo (that is, without deference to the judgment of the district court). Consistent with the appellate court's position at oral argument, the court's opinion (written by Judge Tatel) analyzed the challenged provisions of Regulation II through the lens of *Chevron* step two. Having done so, the appellate court found that, with one minor exception, the Board had demonstrated that it reasonably interpreted the Durbin Amendment's interchange fee and network exclusivity mandates. Although the court of appeals described the text of the Durbin Amendment as "confusing," "convoluted" and "poorly drafted," it

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16 *District Court Opinion* at 114–115.

17 *Id*.

18 Order, *NACS v. Bd. of Governors of the Fed'l Res. Sys.*, Docket No. No. 13-5270 (D.C. Cir. 2013).

wrote that "[a]pplying traditional tools of statutory interpretation, we hold that the Board's rules generally rest on reasonable constructions of the statute[.]"[19]

The Durbin Amendment Does Not Unambiguously Forbid Consideration of Costs Other than Incremental ACS Costs

At oral argument, the court of appeals focused the majority of its attention on Regulation II's interchange-fee limitation. The appellate court's opinion reflects that focus: more than two-thirds of the court's written analysis is dedicated to Regulation II's treatment of the interchange-fee limitation. As described above, the Merchants asserted that the plain language of the Durbin Amendment prohibits the Board from considering any costs other than incremental ACS costs in setting the interchange-fee limitation.[20] The appellate court, however, found that the Durbin Amendment does provide the Board with discretion to consider costs related to debit card transactions other than incremental ACS costs. In arriving at that conclusion, the court of appeals closely analyzed the text of the Durbin Amendment's provision regarding the interchange-fee limitation and the associated definitions, ultimately finding that while the Merchants' reading of the statute was permissible, the statute could "just as easily, if not more easily," be interpreted as the Board interpreted it.[21]

One critical issue in the district court's determination that the Durbin Amendment permitted the Board to consider only incremental ACS costs in setting the interchange-fee limitation was the district court's reading of the statutory provision prohibiting consideration of certain costs, which instructed the Board not to consider "other costs incurred by an issuer which are not specific to a particular electronic debit transaction." The district court agreed with the Merchants that, notwithstanding the absence of a comma before "which" in this clause, the phrase "which are not specific to a particular electronic debit transaction" was intended by Congress to describe the "other costs incurred by an issuer" (that is, that Congress was characterizing all costs incurred by an issuer other than incremental ACS costs as costs not specific to a particular debit card transaction). Therefore, the district court concluded, the Durbin Amendment prohibited the Board from considering any "other costs" that are not incremental ACS costs. After surveying a variety of judicial and stylistic authorities and comparing the text of the relevant provision to other provisions of the Durbin Amendment, the appellate court concluded that the interpretation advanced by the Merchants and adopted by the district court was permissible, but not mandatory. The appellate court concluded that the Board reasonably read "which are not specific to a particular electronic debit transaction" as restrictive, not descriptive (i.e., the costs that the Board was barred from considering were only those within the subset of "other costs incurred by an issuer" that are not specific to a particular debit card transaction). Having found that the statute was susceptible to multiple interpretations, the appellate court then turned to whether the Board's interpretation was reasonable.

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19 *Circuit Court Opinion* at 3.

20 *Id.* at 16.

21 *Circuit Court Opinion* at 16.

The Board Acted Reasonably by Including Three of the Third Category Cost Elements in Establishing the Interchange-Fee Limitation

With respect to three of the four specific third category costs the Board included in setting the interchange-fee limitation (fixed ACS costs, network processing fees, and fraud losses), the court of appeals found that the Board had demonstrated that it acted reasonably in including such costs.[22] With respect to fixed ACS costs, the appellate court found that the Board acted reasonably in permitting recovery of costs that issuers must incur in order to effect a particular electronic debit transaction (such as equipment and hardware costs), even if such costs do not vary on a per-transaction basis, while precluding recovery of costs, like card production, that bear no relationship to "whether, how often, or in what way an electronic debit transaction will occur."[23] The appellate court similarly found the Board's decision to permit recovery of network processing fees to be reasonable. Stating that "[t]his is easy," the appellate court wrote that "[n]etwork processing fees, which issuers pay on a per-transaction basis, are obviously specific to particular transactions."[24]

The Merchants did not dispute that fraud losses are specific to a particular transaction. Rather, the Merchants challenged the Board's decision to permit recovery of fraud losses through the interchange fee, arguing that Congress intended that issuers recover such costs only through the Durbin Amendment's fraud-prevention adjustment. The appellate court found that the Board reasonably determined that fraud losses result from the failure of fraud-prevention measures and so need not be relegated to consideration as part of the fraud-prevention adjustment.[25] The court further found that the fraud-prevention adjustment could reasonably be interpreted as a bonus, over and above the "reasonable and proportional" interchange fee, and therefore, the existence of the fraud-prevention adjustment provision was not intended to determine the costs that could be recovered through the interchange fee.[26]

Transaction Monitoring Costs Remanded to the Board for Further Explanation

As described above, the Durbin Amendment specifically allows for an adjustment to the interchange-fee limitation to compensate issuers for fraud-prevention costs.[27] Receipt of the fraud-prevention adjustment is conditioned on issuers' compliance with fraud-prevention standards established by the Board.[28] The Board conducted separate rulemaking with respect to the fraud-prevention adjustment, pursuant to which the Board established standards that, if satisfied by an issuer, qualify the issuer to receive an additional one-cent fee per transaction. However, the Board included the costs of transaction monitoring within the interchange-fee limitation, rather than as part of the fraud-prevention adjustment,

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22 *Circuit Court Opinion* at 26–30.

23 *Id.* at (*citing to* Final Rule at 43,428).

24 *Id.* at 28.

25 *Id.* at 29 (emphasis in original).

26 *Id.* at 29-30.

27 15 U.S.C. § 1693o-2(a)(5)(A).

28 *Id*.

which ultimately accounted for 1.2 cents of the 21-cent fixed component of the permissible interchange fee amount.[29]

At oral argument, the appellate court questioned the Board's decision to include transaction monitoring costs in the costs considered in establishing the interchange-fee limitation. The court questioned not whether such costs were recoverable by issuers, but the basis of the Board's decision to include them in the 21-cent fixed-interchange-fee limitation rather than as part of the fraud-prevention adjustment. The appellate court's opinion reflected that line of questioning. The court found that, while the Board could have reasonably determined that it was permitted to consider transaction monitoring costs as costs "specific to a particular...transaction,"[30] the Board had failed to "cogently explain" its decision to do so in promulgating Regulation II.[31]

In its appellate brief and in the supplementary material accompanying the publication of the final rule, the Board attempted to distinguish between fraud-prevention costs associated with monitoring systems that provide information to the issuer that informs the decision to approve a given transaction (which the Board argued were transaction-specific costs within the scope of the interchange-fee limitation) and other fraud-prevention costs, including those related to systems that monitor debit card transaction activity for purposes other than informing the issuer's authorization decision (which the Board argued were outside the scope of the interchange-fee limitation, but within the scope of the fraud-prevention adjustment).[32] However, the appellate court was unpersuaded by this distinction. The appellate court stated that, in justifying its consideration of fixed ACS costs, the Board had argued that the Durbin Amendment "allow[ed] recovery of many costs not literally 'specific' to any one 'particular' transaction."[33] The court went on to note that "[t]he costs of hardware, software, and labor seem no more 'specific' to one 'particular' transaction than many of the fraud-prevention costs the Board determined fall within the fraud-prevention adjustment."[34] Therefore, the court wrote, the Board's own justification for considering fixed ACS costs in establishing the interchange-fee limitation undermined the standards the Board used to determine that transaction monitoring costs were transaction-specific (and therefore includable in determining the interchange-fee limitation), but other fraud-prevention costs were non-transaction-specific (and therefore includable in determining the fraud-prevention adjustment, but not the interchange-fee limitation).

Because the appellate court found that the Board's interchange-fee limitation as a whole "generally rests on a reasonable interpretation of the statute," the court remanded the transaction monitoring

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29 Bd. of Governors of the Fed'l Res. Sys., *2009 Interchange Revenue, Covered Issuer Cost, and Covered Issuer and Merchant Fraud Loss Related to Debit Card Transactions* (June 2011), *available at* http://www.federalreserve.gov/paymentsystems/files/debitfees_costs.pdf; Supplementary Material for Regulation II at 76 Fed. Reg. 43394, 43433–43434.

30 *Circuit Court Opinion* at 31.

31 *Id.* at 32 (internal citation omitted).

32 *See Circuit Court Opinion* at 32; 76 Fed. Reg. 43394, 43431.

33 *Circuit Court Opinion* at 32.

34 *Id*.

costs issue to the Board in order to permit the Board to provide a legally adequate explanation for its decision to include such costs within the third category costs that contributed to the interchange-fee limitation. Finding that the Board might be able "readily to cure [this] defect in its explanation of [its] decision" and that vacatur would have a significant disruptive effect on the marketplace, the court of appeals permitted Regulation II to remain in full effect during the Board's proceedings to address the deficiency.[35]

The Board Acted Reasonably in Implementing the Prohibition on Network Exclusivity

The appellate opinion allotted only five of its 38 pages to the Merchants' challenge to Regulation II's formulation of the prohibition on network exclusivity. At the outset, the court stated that the Merchants "have a steep hill to climb" in supporting their arguments, stating that the Board's rule "seems to comply perfectly with Congress's command."[36] The Durbin Amendment obligated the Board to adopt measures preventing issuers and networks from restricting the networks on which an electronic debit transaction may be processed to a single network or only affiliated networks. In the appellate court's estimation, the Board's rule was "exactly what the statute requires."[37]

The Merchants advanced a series of arguments that the Durbin Amendment's prohibition on network exclusivity required the Board to adopt regulations providing that multiple unaffiliated networks must be available for each transaction once initiated at the point of sale. Under this reading of the statute, the Board would be obligated to ensure that at least two debit networks enabled on each debit card supported each method of transaction authentication supported on the card (so that each merchant would have at least two network routing options for each method of authentication).

The appellate court rejected this reading, holding that it was reasonable for the Board to determine that its statutory obligation was to ensure the availability of at least two unaffiliated networks prior to the initiation of a given transaction (and therefore regardless of the authentication methods supported by the networks enabled on a debit card).[38] The appellate court disagreed with the Merchants' arguments that the plain text of the Durbin Amendment expressed Congress's intent that the Board obligate networks and issuers to ensure that every debit card transaction afford the merchant at least two routing options. Instead, the court found that the Board reasonably determined that the Durbin Amendment required only that networks and issuers be prohibited from restricting network choice, stating that "merchants, not issuers or networks, limit their own options when they refuse to accept PIN debit, and cardholders, not issuers or networks, limit merchants' options when given the ability to choose how to process transactions."[39]

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35 *Id.* (internal citation omitted).

36 *Id.* at 35.

37 *Id*.

38 *Id*. at 35–36.

39 *Id.* at 38.

The appellate court acknowledged that the Merchants' preferred reading would have ensured greater competition in the marketplace than the approach adopted by the Board. However, the court found that Board was obligated to further competition, not to maximize it, and that the Board had offered reasonable policy considerations in support of the approach that it chose.[40] As a result, the court wrote, "far from summiting the steep hill, the merchants have barely left basecamp."[41] Finding the Board's interpretation of the Durbin Amendment's prohibition on network exclusivity to be reasonable, the court of appeals fully upheld Regulation II's treatment of the network exclusivity prohibition.

Next Steps

The Merchants may petition the court of appeals for rehearing en banc (that is, by the full panel of the court's judges), or may seek appeal to the U.S. Supreme Court. The Board may also seek appeal or en banc rehearing of the appellate court's remand regarding transaction monitoring costs. A petition for rehearing en banc by the court of appeals must be filed within 45 days of the date on which judgment was entered.[42] Judgment was entered in this case simultaneously with the filing of the opinion (on March 21, 2014). In the event that either party elects to appeal the appellate court's decision to the Supreme Court, a petition for writ of certiorari must be filed within 90 days of entry of the judgment or, if a party petitions for rehearing en banc, within 90 days of the denial of that petition.[43] En banc rehearing and Supreme Court appeal, however, are not as of right, and any such petition or request for appeal by either party may be denied in the discretion of the applicable court. As of the date of this advisory, neither party has stated whether it plans to seek rehearing or to pursue further appeal.

In the event that neither party seeks appeal, the Board must, as ordered by the court of appeals, undertake to provide a legally adequate justification for its treatment of transaction monitoring costs. That process will be governed, as was the Board's original Regulation II rulemaking, by the Administrative Procedure Act, although a new notice-and-comment rulemaking process will not be required.

In addressing the concerns raised by the court of appeals regarding the Board's treatment of transaction monitoring costs, the Board will have several options on remand. The court's opinion did not challenge the recoverability of costs associated with transaction monitoring, but rather the rationale used by the Board in dividing fraud-prevention costs between those recoverable through the interchange fee and those recoverable through the fraud-prevention adjustment. In particular, the court suggested that the Board had not consistently applied its standards for determining whether a cost is "specific to a particular electronic debit transaction." In seeking to more consistently apply those standards, the Board may elect to move additional fraud-prevention costs from the fraud-prevention adjustment to the interchange fee. In the alternative, the Board could determine that, while many of the costs currently allocated to the fraud-prevention adjustment constitute costs "specific to a particular electronic debit transaction" (and therefore,

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[40] *Id*. at 36–37.

[41] *Id*.

[42] Fed. R. App. Proc. 40; D.C. Cir. R. 35.

[43] Sup. Ct. R. 13.

costs that could have been included in determining the interchange-fee limitation), policy considerations justify requiring issuers to meet fraud-prevention standards in order to recover those costs. In that case, the Board would likely leave the current cost allocation intact. Finally, the Board may determine that it cannot provide sufficient justification for categorizing transaction monitoring costs as "costs specific to a particular electronic debit transaction," and may therefore elect to include them in the fraud-prevention adjustment. In that case, the fraud-prevention adjustment would presumably increase to 2.2 cents per transaction, and issuers would be obligated to comply with fraud-prevention standards in order to recover transaction monitoring costs.

At the conclusion of that process, the Merchants (or another party with legal standing) may elect to once again challenge the Board's classification of transaction monitoring costs on the basis that the rationale offered by the Board for such classification is legally inadequate under the Administrative Procedure Act. However, the appellate court did not retain jurisdiction over this matter, and the Board's rationale, once published, will not be submitted to the appellate court for review. Therefore, any such challenge will constitute new litigation.

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