

“THE DURBIN TAX” AND HOW THE BANKS TRIED TO INSURE THEIR BOTTOM LINE

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INTRODUCTION

Minimum balance fees, non-bank ATM fees, lost card fees and debit transaction fees. These are just some of the charges that banks have subjected consumers to over the years. While these fees are something most consumers have likely been charged, they are often avoidable, and usually never amount to more than a few dollars. However, these numerous small fees ultimately accumulate to large amounts of revenue for banks that charge a few dollars here and there to millions of consumers.

Recently, some banks announced that they would substantially expand this practice. Most notably, in late September 2011, Bank of America announced that, beginning in 2012, it planned to charge its customers \$5 per month to maintain their debit card accounts.¹ This proposed fee would have applied to all customers who made at least one monthly purchase with their debit card, regardless of whether they chose “debit” or “credit” at the point of sale.² Bank of America is not the only bank that explored such new fees. Both JPMorgan Chase Bank (“Chase”) and Wells Fargo Bank have experimented with new fees in limited markets.³ Many of these banks believe charging such fees is necessary to recoup profits lost due to the recent restrictions on merchant point of sale fees instituted in the Dodd-Frank Act (the “Act”).⁴ A monthly across-the-board fee

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¹ Blake Ellis, *Bank of America to Charge \$5 Monthly Debit Card Fee*, CNNMONEY.COM (Sept. 29, 2011), http://money.cnn.com/2011/09/29/pf/bank_of_america_debit_fee/index.htm.

² *Id.*

³ *Id.*

⁴ See Halah Touryalai, *Bank of America’s New \$5 Debit Fee? Blame Dodd-*

differs from the fees banks have traditionally charged because it covers a much broader range of consumers and charges consumers for the very thing for which the card is intended.

The proposed fees were highly criticized in the media and by consumers themselves. The fees were so widely criticized that Bank of America and others ultimately abandoned their plans in the face of growing consumer pressure. Accordingly, this Article will explore the issues surrounding these proposed fees and the reasons behind them. Part I of this Article will look at why these proposed fees came about. Part II of this Article will look at consumers’ and government officials’ reactions and criticisms with regard to these fees. Finally, Part III will look at the future of bank fees and Bank of America’s reasons for ultimately not pursuing this monthly fee.

I. THE BANKS’ MOTIVATION FOR CHARGING MORE FEES

Why do banks want to charge more in fees? The answer to this question seems very simple: to make more money. There are, however, much more complex reasons for this recent proposed onslaught of fees. The banks and many analysts blame the recent regulatory limitations on how much a bank may charge merchants for processing debit card purchases as one of the main culprits of the proposed fees.⁵ Since October 1, 2011, banks have only been able to charge merchants an interchange system transaction fee that is “reasonable and proportional” to the amount of money which it takes the issuer to process that transaction.⁶ Practically speaking, this means that for the average \$38 debit transaction, merchants will pay a maximum of 24 cents for that transaction as opposed to the current average of 44 cents.⁷

This new regulation came as a late amendment to the Dodd-Frank Act.⁸ The amendment was sponsored by Illinois Senator Dick

Frank, FORBES (Sept. 29, 2011), available at <http://www.forbes.com/sites/halahtouryalai/2011/09/29/bofas-new-5-debit-card-fee-blame-dodd-frank/>.

⁵ Kim Peterson, *Bank of America Defends \$5 Debit Card Fee*, MSNMONEY.COM (Oct. 7, 2011), <http://money.msn.com/stock-broker-guided/article.aspx?post=d89d802d-76d5-44e8-bc75-c10f12e46208>.

⁶ *Analysis of Dodd-Frank Act: Durbin Amendment*, CAL. BANKERS ASS’N (Aug. 16, 2010) [hereinafter *Analysis of Dodd Frank*], available at <http://www.calbankers.com/compliance-bulletin/analysis-dodd-frank-act-durbin-amendment-debit-card-interchange-fee-regulation>; 15 U.S.C.A. § 1693o-2 (West 2011).

⁷ Peterson, *supra* note 5.

⁸ *Analysis of Dodd Frank*, *supra* note 6.

Durbin. Senator Durbin has stated that this regulation, dubbed the “Durbin Amendment,” was necessary in order to strike a balance within the banking industry.⁹ Banks were targeted because the fees they previously charged merchants to process a transaction “grossly exceed[ed]” the banks’ costs of processing such a transaction.¹⁰ The banks were seen as taking advantage of merchants by charging these high fees. Senator Durbin has pointed out that banks were charging around 400% above what it costs them to process such a transaction.¹¹

It was not an overarching purpose of the Dodd-Frank Act, however, to limit these transaction fees. The Act was set forth in order to end the abuses that banks were accused of committing in the onset of the 2008 financial crisis.¹² The Act also aimed to end many high-risk loan practices, set up better supervision of the nation’s banks and create a consumer protection agency.¹³

Opponents of the Act believe that it infringes on the rights of banks. These opponents believe that the fee caps are simply another way the government is trying to exert more control over businesses.¹⁴ These opponents also believe that the fees proposed by institutions, such as Bank of America and Wells Fargo, are necessary for banks to make money in an overly regulated industry.¹⁵

Before abandoning its plan, Bank of America had been outspoken in its efforts to justify the fees to consumers and the Consumer Protection Bureau.¹⁶ Bank of America believed that this fee was necessary because it would partially compensate for the large amount of profit the bank will lose due to the Durbin Amendment.¹⁷ Bank of America was using its lobbying power to convince members of Congress and the Consumer Protection Bureau that the fee was reasonable in light of the newly imposed regulations.¹⁸

Similarly, other banks have also experimented with the idea

⁹ Sunlen Miller, *Durbin to Bank of America Customers: ‘Get the Heck Out of That Bank’*, ABCNEWS (Oct. 3, 2011), <http://abcnews.go.com/blogs/politics/2011/10/durbin-to-bank-of-america-customers-get-the-heck-out-of-that-bank/>.

¹⁰ See Ellis, *supra* note 1.

¹¹ *Id.*

¹² Edward Wyatt, *Dodd-Frank Act a Favorite Target for Republicans Laying Blame*, N.Y. TIMES, Sept. 20, 2011, at B1, <http://www.nytimes.com/2011/09/21/business/dodd-frank-act-is-a-target-on-gop-campaign-trail.html?pagewanted=all>.

¹³ *Id.*

¹⁴ See *id.*

¹⁵ Ellis, *supra* note 1.

¹⁶ Peterson, *supra* note 5.

¹⁷ *Id.*

¹⁸ See *id.*

of charging additional fees.¹⁹ Chase tested a \$5 ATM withdrawal fee for non-Chase customers in select markets in May 2011.²⁰ Chase and Wells Fargo also began to explore a \$3 monthly debit card fee in select markets.²¹ Many regional banks also experimented with monthly fees.²² However, these fees were all abandoned due to the consumer uproar in the wake of the various fee announcements.

Furthermore, there has been debate as to whether banks should be entitled to charge fees that are disproportionately large or that charge the consumer for merely participating in the bank’s business. Bank of America CEO Brian Moynihan had publicly defended the proposed fee stating that the bank has an inherent right to make a profit.²³ Moynihan also stated that Bank of America customers and shareholders are aware of this and will understand why the fee is charged.²⁴ While Bank of America believed that these proposed fees were necessary for them to sustain their profits, there was a well-publicized backlash, with vigorous opposition coming from both consumers and politicians.

II. CONSUMER & POLITICAL BACKLASH

A. Consumers

The prospect of a new fee is something that stirs skepticism, even anger, in almost all of us. In difficult economic times, new fees are all the more aggravating and cumbersome for consumers. The \$5 monthly debit card fee proposed by Bank of America was no exception. Many consumers did not greet this proposed fee with the

¹⁹ *Durbin Slams Bailed-Out Bank Over New Debit Card Fee*, FOX NEWS (Sept. 30, 2011) [hereinafter *Durbin Slams Bank*], <http://www.foxnews.com/politics/2011/09/30/durbin-slams-bailed-out-bank-america-over-new-debit-fee/>.

²⁰ Blake Ellis, *Goodbye, \$5 ATM Fees*, CNNMONEY.COM (May 2, 2011), http://money.cnn.com/2011/05/02/pf/atm_fees_chase/index.htm. Chase, however, discontinued this fee a short time later. Analysts point out that a fee such as this may be disproportionately burdensome because a non-Chase customer could pay up to \$8, or 40%, on a \$20 withdrawal if the home bank and Chase fees are taken into account. *Id.*

²¹ Candice Choi, *Wells Fargo to Try \$3 Monthly Debit Card Fees This Fall*, HUFFINGTON POST (Aug. 17, 2011), http://www.huffingtonpost.com/2011/08/17/wells-fargo-to-try-3-monthly-debit-fees_n_929562.html.

²² *Durbin Slams Bank*, *supra* note 19.

²³ Jennifer Liberto, *B of A Chief: We Have a 'Right to Make a Profit'*, CNNMONEY.COM (Oct. 5, 2011), http://money.cnn.com/2011/10/05/news/economy/bank_of_america_moynihan/index.htm.

²⁴ *Id.*

understanding Bank of America's CEO had envisioned. To the contrary, consumers were appalled by this fee and made their anger known.

In the days after the fee was first announced, many social networking sites, such as Twitter, exploded with posts about the unfairness of Bank of America's fee and the willingness of many consumers to take their business to another bank.²⁵ In March 2011, the Financial Securities Index conducted a poll asking the question, "[i]f your bank or financial institution raised its fees on checking accounts, would you consider switching to a different checking account provider?"²⁶ In response to this question, sixty-four percent of respondents said they would consider changing, just twenty-eight percent said they would not, and eight percent did not know or did not have a checking account.²⁷ The number of respondents stating they would consider changing providers jumped to seventy-one percent in people under thirty, and to seventy-five percent of respondents earning more than \$75,000 annually.²⁸ While these March poll results did not directly address the new monthly debit fees announced in September, they foretold the consumer backlash toward additional bank fees. The results further demonstrated the potential unwillingness of consumers to pay more for an institution to hold their money, particularly consumers in the most desired demographics.

When analyzing whether the proposed fees would have had an actual impact, the primary question was whether the fees would have been enough for consumers to, in fact, go through the inconvenience of switching banks. Accordingly, consumer advocates have written articles touting the actual ease of switching banks.²⁹ Advocates were attempting to convince hesitant consumers that switching account and deposit information from one bank to another took as little as ninety minutes, and future complications could be

²⁵ Jessica Dickler, *Bank of America May Get the Last Laugh*, CNNMONEY.COM (Sept. 30, 2011), http://money.cnn.com/2011/09/30/pf/bank_of_america_fee/index.htm.

²⁶ Claes Bell, *Americans Say They'd Bolt Bank Over Fees*, BANKRATE.COM (Mar. 21, 2011), <http://www.bankrate.com/finance/consumer-index/march-2011-financial-security-poll.aspx>.

²⁷ *Id.*

²⁸ *Id.*

²⁹ Ron Lieber & Ann Carrns, *Question: Why Pay Bank Fees?*, N.Y. TIMES, Sept. 30, 2011, at B1, <http://www.nytimes.com/2011/10/01/your-money/bank-fees-on-debit-cards-have-some-customers-looking-to-switch.html?pagewanted=all>.

resolved relatively painlessly.³⁰ Also, many consumer advocates blogged and wrote articles about the relative ease of avoiding the monthly fee by doing things such as using credit cards instead of debit cards.³¹

The new regulation and proposed monthly fees would have simply transferred a burden. While the Durbin Amendment relieved merchants of higher fees, the proposed monthly fee would have restored the banks to their prior profitability.³² However, although the merchants and banks would have been relieved of their respective burdens, the consumer would ultimately have filled the cost gap. Individually, \$5 per month may not sound like a significant cost to the consumer, but as these various fees add up, the consumer ultimately bears a substantial burden for access to banking products.

B. Political Viewpoints

In addition to the dissatisfaction of many consumers and consumer groups, there was also a strong reaction from lawmakers to Bank of America’s plan. Senator Durbin, the main proponent of the amendment requiring only reasonable and proportional card processing fees on merchants, was perhaps the most outspoken critic of the banks’ proposed fees on consumers. Senator Durbin openly told consumers who use Bank of America to bank somewhere else.³³ Senator Durbin pointed to the contradictory actions of Bank of America: on the one hand, encouraging its customers to use their debit cards and, on the other hand, charging customers a fee for this.³⁴ Senator Durbin and many other lawmakers hoped that consumers would have the final say on the inherent unfairness in these fees by “voting with their feet”—switching to a competitor that continues to provide free debit card usage.³⁵

Lawmakers were also upset because many of the banks that were exploring these new consumer fees received billions in taxpayer

³⁰ *Id.*

³¹ Dickler, *supra* note 25; Attiyya Anthony, *4 Ways to Avoid That Dreaded Monthly Debit Fee*, HUFFINGTON POST (OCT. 4, 2011), http://www.huffingtonpost.com/attiyya-anthony/4-ways-to-avoid-that-drea_b_994597.html.

³² Halah Touryalai, *The “Durbin Tax” is Paying Off...For Retailers*, FORBES (OCT. 5, 2011), <http://www.forbes.com/sites/halahtouryalai/2011/10/05/the-durbin-tax-is-paying-off-for-retailers/>.

³³ Miller, *supra* note 9.

³⁴ *Id.*

³⁵ *Id.*; *Durbin Slams Bank*, *supra* note 19.

bailout dollars when the financial crisis hit in 2008.³⁶ Senator Durbin was particularly critical of Bank of America because it was the single largest recipient of bailout funds in 2008.³⁷ If the fee was instituted, the taxpayers who financed Bank of America through the crisis would pay more for the bank's services.

Further, Senator Durbin believes there were improper motives for this fee.³⁸ When addressing this fee, Senator Durbin stated that, "[i]t seems that old habits die hard for Bank of America. After years of raking in excess profits off an unfair and anti-competitive interchange system, Bank of America is trying to find new ways to pad their profits by sticking it to its customers."³⁹ This sentiment was shared by many. Legislators and consumers alike cried foul because these fees were Bank of America's solution to restore profit that was lost due to the government regulation of another perceived inequity.

Like many legislators and consumers, President Obama also stated his disappointment in these proposed fees. President Obama remarked that he does not believe that banks have an "inherent right" to make a "certain amount of profit."⁴⁰ President Obama does not believe that charging consumers a monthly fee is a good business practice and hopes that banks will realize this.⁴¹

While many Democrats were very critical of Bank of America, many Republicans took just the opposite view and criticized the various stricter regulations and provisions of the Dodd-Frank Act.⁴² Republicans believed that regulations, such as the interchange fee caps and others, would have a negative effect on the economy, and ultimately on consumers, because banks would need to make up for lost profits.⁴³ For them, the \$5 fee and other consumer costs can be seen as expected consequences of a government measure that will cost banks billions of dollars.⁴⁴

Whether one points to increased regulations endorsed by

³⁶ *Durbin Slams Bank*, *supra* note 19.

³⁷ *Id.* It should, however, be noted that Bank of America has re-paid all \$45 billion of the bailout money to the United States government, and the government made around \$4 billion off of the deal. *Id.*

³⁸ *See id.*

³⁹ *Id.*

⁴⁰ Peter Schroeder, *Obama Says He Can Stop Bank of America From Making 'A Certain Amount of Profit'*, FOX NEWS (Oct. 4, 2011), <http://nation.foxnews.com/president-obama/2011/10/03/obama-says-he-can-stop-bank-america-making-certain-amount-profit>.

⁴¹ *Id.*

⁴² Wyatt, *supra* note 12.

⁴³ *See id.*

⁴⁴ Peterson, *supra* note 5.

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politicians or to the reaction it generated by the banks, if the fees were instituted, the consumer would ultimately have had to pay for these reforms and the prevention of “unreasonable” fees to merchants.

III. THE FUTURE & WHY BANKS ABANDONED ADDITIONAL FEES

A. The Future

As this Article has emphasized, \$5 per month may not seem like a lot of money, but this monthly fee would be just another addition to the long list of bank fees that includes minimum balance fees, non-bank ATM fees, lost card fees and debit transaction fees. While it is difficult to truly discern who is to blame for this newest fee, the fact remains that its proposal has angered consumers and spurred them to action, as many vowed to leave banks that would charge additional fees.

As mentioned, one of the long-lasting impacts of the Durbin Amendment to the Dodd-Frank Act will be banks losing billions of dollars in merchant fees. Banks will inevitably look for ways to make up for these lost profits. This has already been apparent through Bank of America and other banks’ monthly fee propositions.⁴⁵ Other banks have taken different measures to make up for their lost merchant fees.⁴⁶ Banks such as Chase, Wells Fargo and PNC Bank have all announced that they will be ending their “debit rewards” programs, which gave consumers a certain percentage “cash-back” on purchases or “points” that could be used for purchases.⁴⁷ While most banks have announced they will abandon monthly fees, the fact remains that the Act has decreased the banks’ bottom line and puts consumer benefits at risk.

In the end, this Act will likely benefit merchants. It is estimated by Heartland Payment Systems, one of the nation’s largest payment processors, that the average merchant will save around \$1,000 per year because of the cap on processing fees.⁴⁸ For small businesses, this is a rather sizeable yearly savings. It is possible that such savings may ultimately benefit the consumer as the cost-savings may be reflected in consumer prices. However, it is still too early to

⁴⁵ *Durbin Slams Bank*, *supra* note 19.

⁴⁶ Choi, *supra* note 21.

⁴⁷ *Id.*

⁴⁸ Touryalai, *supra* note 32.

tell if \$1,000 a year in savings will have a meaningful impact on merchants. It is much more likely that individual consumers would have noticed the \$5 per month fee they would have had to pay just to purchase goods with their debit card.

B. Why Banks Abandoned Additional Fees

Both consumers and politicians were furious about the prospect of a new \$5 monthly debit card fee. Bank of America took note of this uproar, and a little over a month after announcing the fee, decided to abandon it.⁴⁹ Other banks also noticed the consumer backlash and either abandoned the fees they planned on implementing or vowed not to impose an across-the-board fee.⁵⁰

In an interesting demonstration of consumer strength in numbers, part of the reason why this fee was abandoned was a simple consumer petition.⁵¹ A bank customer named Molly Katchpole started the petition after Bank of America announced the fee in September 2011. In the following month, over 300,000 people went to *www.change.org* and signed the petition.⁵² So many consumers being mobilized so quickly demonstrates the depth of consumer frustration and the strength of the collective consumer base.

Bank of America's abandonment of the fee demonstrates the power that consumers have in implementing change. The outrage that consumers felt first persuaded many of Bank of America's competitors to abandon their fee ambitions, and Bank of America soon succumbed to consumer pressure and the prospect of being the only bank that charged a monthly fee.⁵³

While the banking industry stands to lose around \$8 billion per year because of the Durbin Amendment, the banks will not yet be getting this money back from consumers, as many banks had hoped.⁵⁴ The coming months and years will show how banks will react to these lost profits and whether consumers will bear the burden in the

⁴⁹ Hugh Sun, *Bank of America Eliminates Plan for \$5 Debit-Card Fee*, BLOOMBERG (Nov. 1, 2011), <http://www.bloomberg.com/news/2011-11-01/bank-of-america-drops-plan-for-5-debit-fee-as-competitors-scrap-charges.html>.

⁵⁰ *Id.*

⁵¹ Molly Katchpole, *How Our Petition Beat Bank of America's Debit Card Fee*, THE GUARDIAN (Nov. 2, 2011), <http://www.guardian.co.uk/commentisfree/cifamerica/2011/nov/02/petition-bank-of-america-debit-card-fee?newsfeed=true>.

⁵² *Tell Bank of America: No \$5 Debit Card Fees*, CHANGE.ORG (Nov. 1, 2011), <http://www.change.org/petitions/tell-bank-of-america-no-5-debit-card-fees>.

⁵³ Katchpole, *supra* note 51.

⁵⁴ Sun, *supra* note 49.

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end.

CONCLUSION

When someone takes a look at their monthly bank statement, they may be confronted with a wide array of charges and fees. While any one of these fees does not appear substantial, when applied together, they have the potential of making a noticeable difference on the consumer’s pocketbook.

The proposed \$5 debit card fee from Bank of America would have been another banking cost added to the pile burdening the consumer every month. As this Article has discussed, the Durbin Amendment to the Dodd-Frank Act aimed to end “unreasonable” and disproportionate merchant transaction fees by banks.⁵⁵ Banks sought to counter by imposing fees on consumers and ending rewards programs. Bank of America and other banks’ attempts to shift the cost burden was simply too much for consumers to swallow.

The consumer rejection and bank abandonment of the \$5 monthly fee has demonstrated that consumers as a group have a great deal of power to change things by voicing their concerns or simply walking away. In the last few months, consumers voiced discontent with the new fees and many said that they would take action to avoid such fees. The concerted pressure has shown that consumers are indeed willing to “vote with their feet” and force banks to re-think whether they can recover profits lost elsewhere at the expense of the consumer.

⁵⁵ Ellis, *supra* note 1.