

October 4, 2022

The Honorable Chuck Schumer  
Majority Leader  
U.S. Senate  
Washington, D.C. 20510

The Honorable Mitch McConnell  
Minority Leader  
U.S. Senate  
Washington, D.C. 20510

The Honorable Nancy Pelosi  
Speaker  
U.S. House of Representatives  
Washington, D.C. 20515

The Honorable Kevin McCarthy  
Minority Leader  
U.S. House of Representatives  
Washington, D.C. 20515

The Honorable Jack Reed  
Chairman  
Senate Armed Services Committee  
U.S. Senate  
Washington, D.C. 20510

The Honorable James Inhofe  
Ranking Member  
Senate Armed Services Committee  
U.S. Senate  
Washington, D.C. 20510

The Honorable Adam Smith  
Chairman  
House Armed Services Committee  
U.S. House of Representatives  
Washington, DC 20515

The Honorable Mike Rogers  
Ranking Member  
House Armed Services Committee  
U.S. House of Representatives  
Washington, DC 20515

**Re: Bank and Credit Union to Opposition to Senate NDAA Amendments 6201 & 6174;  
Durbin Amendment Expansion Via NDAA**

Dear Majority Leader Schumer, Minority Leader McConnell, Speaker Pelosi, Minority Leader McCarthy, Chairman Reed, Ranking Member Inhofe, Chairman Smith, and Ranking Member Rogers:

The undersigned state and national trade associations, representing virtually all banks and credit unions, including those primarily serving military-affiliated customers and members, write to express our strong opposition to consideration of the so-called “Credit Card Competition Act of 2022” (Amendment 6201) and an impractical, technically-flawed, and unnecessary study proposal (Amendment 6174) as amendments to this year’s National Defense Authorization Act (NDAA). Both are aimed at to expanding the Durbin Amendment (Dodd-Frank Wall Street Reform Act (Dodd- Frank Act)).<sup>1</sup>

---

<sup>1</sup> The Durbin Amendment added Section 920 (15 U.S.C. § 1693o-2) to the Electronic Fund Transfer Act (EFTA) (15 U.S.C. §§ 1693 *et seq.*) to include provisions capping interchange transaction fees for electronic debit transactions and rules for payment card transactions. The Durbin Amendment was included in the Dodd–Frank Act at the last minute, without a hearing and despite being unrelated to the subject matter of the Act. In 2013, commenting upon a settlement between merchants and payments companies, former House Financial Services Committee Chair Barney Frank (D-Mass.) stated “I believe that a free market approach in this area will be better for the economy and all concerned parties than the current [Durbin] system” and noted that Senate procedures prevented important changes to the Durbin Amendment. Also following passage, Senators John Tester and Bob Corker introduced legislation to delay implementation of the Durbin Amendment.

These non-germane amendments will rob military families of their credit card rewards, reduce the availability of safe credit, and undermine the nation's data security. They have been filed with the goal of enriching the largest multinational retailers and obscure payments processors and have no business being added to annual legislation designed to bolster our national defense. After months spent failing to obtain more than a single co-sponsor for the CCCA, it does not belong in NDAA.<sup>2</sup>

Both proposals are complex and flawed and in need the scrutiny of regular order in the respective committees of jurisdiction (in fact, Amendment 6174 has never been introduced prior to this NDAA). These highly-contentious and divisive amendments directly implicate the interests of various committees with judicial, federal prudential, and international trade oversight.

Further, these amendments represent the encouragement of potentially unconstitutional or illegal public policies given their explicit contravention of the "two-sided market" doctrine set by the U.S. Supreme Court, and its finding that the credit card market is not anticompetitive.<sup>3</sup> The market is competitive, according to the Herfindahl-Hirschman Index which is the standard market competition metric used by the Department of Justice and Federal Trade Commission. The amendments would also constitute an unprecedented and premature legislative intervention in other matters currently under active litigation and settlement phases in various federal courts.

Not only is the CCCA not germane to the NDAA, but it will seriously hurt consumers, small community banks, and credit unions, including financial institutions that serve members of the military.

### **The Proposed Study Would Waste Taxpayer Resources and Duplicate Existing Data**

The "Study" amendment is a litany of slanted research questions hastily written to reach a foregone conclusion. A costly study is unnecessary in light of years of independent, high-quality research by the Federal Reserve and academics. A new report from the Fed shows that credit card issuers *lose* money on transaction fees they charge to merchants because the issuers pay those fees back out to others, including consumers, in the form of services provided.

The study amendment also makes no reference to the costs borne by military families in the form of rising retail prices at Kroger, Walmart, Amazon and others. It asks no questions about why military families working at big retailers are seeing their wages lag far behind the price increases they are being charged. It does not look at the failure of big retail to pass along their savings from the original Durbin amendment to veterans and military families in the form of lower prices. Nor

---

<sup>2</sup> "Capital Alpha's Katz wrote Sunday that the NDAA 'is considered must-pass legislation,' likely why Durbin and Marshall are trying to get their bill attached to it. 'The effort feels like a desperation move because Durbin and Marshall don't believe the bill could pass as a standalone.' He further noted that the card-routing bill 'has nothing to do with defense,' something that's "not an insurmountable obstacle, but for unrelated legislation to latch onto a bigger bill it typically needs broader support than this one has.'" *Bill targeting Visa and Mastercard is 'still alive,' but latest path 'feels like a desperation move'; Legislation around credit-card routing is floated as amendment to defense budget, but analyst notes the bill 'has nothing to do with defense'*. Marketwatch, 10/3/2022

<sup>3</sup> In its *Ohio v. American Express Co.*, the Court found that the U.S. credit card market did not bear the hallmarks of a non-competitive market, and that because card transactions are a two-sided market (with merchants and their banks on one side of a transaction and consumers and their card-issuing financial institution on the other), the appropriate method of analysis was that of a "two-sided market." See 138 S. Ct. 2274 (2018). The proposed Marshall-Durbin study amendment would analyze the credit card market through the rejected one-sided market framework.

do the sponsors want to study big retailers' labor<sup>4,5</sup> and military<sup>6</sup> policies that have come under significant scrutiny in recent years. The reality is that cards have expanded access to Morale, Welfare, and Recreation (MWR) facilities, saving military-affiliated consumers money<sup>7</sup>. If ever a proposed study was designed to miss the big picture, it's this one.

While executives at companies like Kroger and Albertson's<sup>8</sup> boast about their ability to freely increase prices on captive consumers, the sponsors introduced these amendments to boost these companies' triple-digit profit increases even further and were apparently uninterested in studying how their mega retailer allies are draining the wallets of military families through profitable price increases. Ultimately, these amendments are about passing the buck for higher prices: ensuring that as many bucks as possible pass right out of military families' pocketbooks and into the dividends of publicly-traded retailers.

### **The Proposed Study Would Violate the Financial Privacy of American Heroes**

It is cynical and disrespectful to those who served and sacrificed to invoke Purple Heart recipients, POW-MIA heroes, and disabled American veterans in a desperate attempt to buoy the earnings of corporate retailers, yet the Study amendment does this. Worse, their plan to tally up the spending of these singled-out Americans would require the federal government to undertake an unprecedented violation of their privacy by de-anonymizing their transaction histories, without their consent or due process of law. We urge Senators Marshall and Durbin to remove those sections immediately so that a debate about bank regulation can occur on civil and reasonable grounds. As organizations whose members serve, employ, and protect the privacy and data of these Americans, we are taken aback by this tactic.

\* \* \*

*Continues on next page*

---

<sup>4</sup> [Walmart changes military leave policy, agrees to pay up to \\$14 million for reservists' claims](#). Military Times, 1/5/21

<sup>5</sup> [Grocery Stores Are Excited to Serve You Higher Prices](#). CNN Business, 6/18/21

<sup>6</sup> [Military Families Overseas Say They Can't Order from Amazon Anymore](#). Military Times, 3/26/20

<sup>7</sup> According to a 2019 *Federal Register* Notice by the Office of the Secretary of Defense, a commissary purchase made by card "still nets a 23.2 to 22.8 percent overall savings to the consumer" versus non-commissary prices.

<sup>8</sup> "Our business operates the best when inflation is about 3% to 4%," Kroger CEO Rodney McMullen said on an earnings call with analysts Thursday. "A little bit of inflation is always good in our business." Kroger can pass off costs to consumers when inflation hovers around that mark, McMullen said, and "customers don't overly react to that." [Grocery Stores Are Excited to Serve You Higher Prices](#). CNN Business, 6/18/21

## **The Credit Card Competition Act Will Reduce Competition**

The CCCA will not increase competition in the credit card marketplace, but it will benefit multi-national retailers at the expense of consumers and community financial institutions, including those serving members of the military. It does so by reducing the number of credit card issuers competing for consumers' business, removing a consumer's choice of preferred card network, reducing the competitive differences among card products, limiting popular credit card rewards programs, and putting the nation's private-sector payments system under the micromanagement of the Federal Reserve Board. It will also make it more difficult for merchants and federally-insured financial institutions to prevent fraud and protect the transaction data.

## **The CCCA Increases Profits for the Sponsors' Favored Firms**

Further, this legislation circumvents the free market to award private-sector contracts to a small handful of payment networks favored by the bills' sponsors in order to pad the profits of the largest e-commerce<sup>9</sup> and multi-national retailers<sup>10</sup> who are raising prices on American families far more than the real rate of inflation.<sup>11</sup>

## **Retailer Profits Are At Record Highs – This is About Stock Prices for the Biggest Players**

In fact, Federal Reserve Board Vice Chair Lael Brainard stated<sup>12</sup> recently that retailer profits are near their highest levels since World War II. Yet these global retail giants are demanding that Washington intervene on their behalf, even as they reject measures to cap their sudden price increases on everyday consumers.

Despite its authors' claims, the CCCA will result in fewer options for consumers, greater threats to consumer data and privacy, weakened community banks and credit unions, and the disappearance of card rewards programs (i.e., airline miles) that families of all income levels utilize.

## **This is Durbin Amendment 2.0 – Recycling a Failed Policy**

The federal government's attempt to impose price controls by regulating interchange through the Durbin Amendment is the purest example of a failed government policy. If the goal of the requirement that credit unions and banks enter contractual relationships with many payment networks was to reduce costs to consumers, then it failed. Congress should not double down on this failure in this year's NDAA, especially considering it is not germane to this bill.

---

<sup>9</sup> [The World's Largest Retailers 2022: Pandemic Helps Amazon Cement Its Lead](#). Forbes, 5/12/22

<sup>10</sup> [Grocery Stores Are Excited to Serve You Higher Prices](#). CNN Business, 6/18/21

<sup>11</sup> [Revealed: top US corporations raising prices on Americans even as profits surge](#). The Guardian, 5/12/22

<sup>12</sup> "[I]n the second quarter [of 2022], measures of profits in the nonfinancial sector relative to GDP remained near the postwar peak reached last year... Similarly, **overall retail margins—the difference between the price retailers charge for a good and the price retailers paid for that good—have risen significantly more than the average hourly wage that retailers pay workers to stock shelves and serve customers over the past year, suggesting that there may also be scope for reductions in retail margins.** With gross retail margins amounting to about 30 percent of sales, a reduction in currently elevated margins could make an important contribution to reduced inflation pressures in consumer goods." Prepared remarks of Federal Reserve Vice Chair Lael Brainard at a financial services conference, New York, September 7, 2022.

For the reasons laid out above, and to protect consumers and financial institutions that support American servicemembers, we urge you to oppose any consideration of the CCCA amendment (Amendment 6201) or related Study amendment (Amendment 6174) to the NDAA.

*Sincerely,*

AMERICAN BANKERS ASSOCIATION

ASSOCIATION OF MILITARY BANKS OF AMERICA

BANK POLICY INSTITUTE

CONSUMER BANKERS ASSOCIATION

CREDIT UNION NATIONAL ASSOCIATION

DEFENSE CREDIT UNION COUNCIL

ELECTRONIC PAYMENTS COALITION

INDEPENDENT COMMUNITY BANKERS OF AMERICA

NATIONAL ASSOCIATION OF FEDERALLY-INSURED CREDIT UNIONS

NATIONAL BANKERS ASSOCIATION

cc: The Honorable Amy Klobuchar, Chairwoman, Senate Rules Committee  
The Honorable Roy Blunt, Ranking Member, Senate Rules Committee

The Honorable Jim McGovern, Chairman, House Rules Committee  
The Honorable Tom Cole, Ranking Member, House Rules Committee