COMMENTS OF THE ABA SECTIONS OF ANTITRUST LAW AND INTERNATIONAL LAW TO THE EUROPEAN COMMISSION’S GREEN PAPER: TOWARDS AN INTEGRATED EUROPEAN MARKET FOR CARD, INTERNET AND MOBILE PAYMENTS

March 22, 2012

The views stated in this submission are presented on behalf of the Sections of Antitrust Law and International Law only. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore may not be construed as representing the policy of the American Bar Association.

The Sections of Antitrust Law and International Law of the American Bar Association are pleased to submit these comments on the issues and questions posed by the European Commission in its Green Paper entitled: “Towards an integrated European market for card, internet and mobile payments” (the “Green Paper”). The Sections commend the Commission’s extensive and thoughtful review of the myriad issues that arise from the existing electronic payments system and future challenges as the use and scope of electronic payments develops, and the effort to develop general principles to guide policy. The Sections appreciate the opportunity to participate in the Commission’s consultation process as it explores the current bounds of European law and options for enhancing the operation of the electronic payments system in the future.

The Green Paper poses a wide range of questions concerning the potential obstacles to, and the best ways to foster, European integration in the card, internet and mobile payment markets. Some of these questions call for specialized knowledge and experience regarding the workings of EU law and the laws of Member States. Other commentators have greater expertise and experience in these areas of law and are better situated to comment on these particular issues. The Sections have significant experience with the operation and legal treatment of the electronic payments system in the U.S. and therefore provide comments drawing on perspectives gained from the U.S. experience.

The current legal landscape applying to the electronics payments system in the U.S. is varied and in many areas unsettled. The issues are most developed in relation to credit and debit payment cards, and our comments focus to a large extent on these products. We attempt here to
draw out general principles that can assist the European Commission in its efforts to develop appropriate policies, while noting that this experience suggests that there can be differences among networks or market conditions in which they operate that are relevant to competitive concerns or choice of policy.

These comments do not take a position on whether the European Commission should seek to regulate aspects of the electronic payments system as suggested in the Green Paper, or the format such regulations might take. Rather, the purpose of these comments is to explain how many of the issues raised in the Green Paper have been addressed in the U.S. in the regulatory as well as judicial context, in particular in relation to payment cards.

**EXECUTIVE SUMMARY**

The Comments below address the following aspects of the Green Paper:

1. Multilateral Interchange Fees (Green paper 4.1.1)
2. Co-Badging (Green Paper 4.1.3)
3. Bundling of card schemes and payment processing (Green Paper 4.1.4)
4. Information on the availability of funds (Green Paper 4.1.7)
5. Transparency and restrictive card scheme rules (Green Paper 4.2)

Given that many of the payment system issues the Green Paper addresses have been the subject of regulatory review and private and government litigation in the U.S. over the past thirty years, we thought it would be helpful to summarize the most relevant U.S. proceedings, which are referenced in portions of the Sections’ specific comments to the Green Paper. This summary appears in the Appendix to these Comments.
1. Multilateral Interchange Fees (Green Paper 4.1.1)

The Sections agree with the Commission that clarity in the legal treatment of multilateral interchange fees, or MIFs, is a desirable goal. It is not clear, however, in what manner such clarity can best be achieved.

It is our understanding that the treatment of card payment schemes from an EU antitrust perspective remains uncertain, as important issues are pending adjudication by the EU General Court in an appeal by MasterCard (MasterCard and others v European Commission). Further, the Sections understand that the Commission has been investigating Visa's MIFs, and that, whilst Visa has come to a settlement with the Commission regarding the level of Visa's immediate debit card MIFs, the Commission's investigation of other aspects, including credit card MIFs, remains ongoing. The Sections also understand that the Commission is carrying out a study in relation to the costs of cards. The outcome of these reviews – and in particular the General Court's judgment in the MasterCard appeal – of very complex questions of law and economics may provide valuable information to the Commission concerning its ability to address concerns with MIFs under existing competition law rules as it considers what, if any, regulatory action to undertake.

There are different views and approaches in the U.S. and other countries (e.g., Australia) as to the desirability and efficacy of direct regulation of MIFs. One view is that, in light of the competitive nature of the industry and the consumer benefits that result from this competition, there is not sufficient evidence of a competitive problem at this time that needs to be addressed by further regulation. This is consistent with the traditional view that competition policy recommends forbearance when there is no indication of significant market power. Another view is that structural change (including changes to the rules applied within a payment scheme) will allow the payments system to recalibrate to a competitive equilibrium in which prices (MIFs) are established competitively, and that through such structural change MIFs will fall to an

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1 Case T-111/08 MasterCard and others v European Commission. The Sections understand that pending adjudication of the appeal, MasterCard reached an interim settlement with the Commission on the level of MasterCard's cross-border MIFs. See press release IP/09/515 "Commissioner Kroes takes note of MasterCard's decision to cut cross-border Multilateral Interchange Fees (MIFs) and to repeal recent scheme fee increases," April 1, 2009.

appropriate level. A third view is that structural change is not sufficient to realign incentives to reduce the overall costs of the payment system and only direct interchange regulation will result in appropriate rates.

In the U.S. experience, which is described in detail in the Appendix, we see examples of the issues raised by these approaches. In the credit card area, the regulators that have addressed these issues have focused on structural issues in the payment system (card association rules, transparency) rather than pursuing rate regulation or even a direct challenge to the schemes’ rate-setting processes. This has been the approach to both three and four-party schemes, although the outcome of this approach in relation to three-party schemes is not yet clear.\(^3\) By contrast, in the debit area, under Dodd-Frank the Federal Reserve has established a maximum debit interchange fee applying to certain debit-card transactions.\(^4\) The implementation of these reforms is relatively recent or in process and their impact remains to be seen.

In addition, private litigants have challenged the Visa and MasterCard schemes’ method of rate-setting – in effect seeking establishment of lower rates – and have challenged both the three and four-party schemes’ card acceptance rules or contractual provisions – seeking structural relief.\(^5\) Litigation is still underway that may affect the operation of the three and four-party payment schemes going forward.\(^6\)

2. Co-Badging (Green Paper 4.1.3)

The issue of co-badging (or “multiple bugs”) has arisen in the United States in the context of private litigation and recent regulation concerning the credit card schemes’ multi-issuer rules, network exclusivity arrangements, and merchant-directed routing restrictions described in the Appendix. On June 29, 2011, the Board of Governors of the Federal Reserve System issued a final rule to implement the Durbin Amendment’s prohibition of exclusivity arrangements and routing restrictions. Under the new regime, an issuer or network cannot directly or indirectly limit the number of networks on which an electronic debit transaction may

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\(^3\) United States v. American Express Company et al., infra at page 20.

\(^4\) Infra at page 21.

\(^5\) See discussion on network rules, infra at pages 10-13.

\(^6\) Infra at page 16-21.
be processed to fewer than two unaffiliated networks without regard to the method of authorization available on each such network, i.e., PIN or signature debit. The network exclusivity prohibition has the following rolling effective dates:

- October 1, 2011, for payment card networks;
- April 1, 2012, for most debit card issuers;
- April 1, 2013, for certain health and other benefit cards subject to certain federal income tax rules; and
- April 1, 2013, for certain general-use prepaid cards.

The Durbin Amendment’s prohibition of routing restrictions prevents issuers and networks from directly or indirectly inhibiting the ability of a merchant accepting or honoring debit cards to route an electronic debit transaction for processing over any network capable of processing the EDT. This rule took effect on October 1, 2011.7

Co-badging is frequently discussed in the context of new technology, such as payments using mobile phones and other technology. Concerns have been raised about whether payment schemes will attempt to limit access by other schemes to consumers’ devices through exclusivity arrangements. To date, the public discussion about mobile phone payments has been to the effect that the phone is viewed as a virtual wallet, and that existing card schemes expect that the wallet will be available to multiple payment brands and mechanisms.

3. Bundling of card schemes and payment processing (Green Paper 4.1.4)

As noted in the Green Paper, some card schemes have subsidiaries that process transactions, and they may require issuing and acquiring entities to use these subsidiaries. The Green Paper discusses the concern that bundling of card schemes and processors may be a barrier to entry, and seeks views on a proposal that card schemes and transaction processors be separated. (Green Paper ¶ 4.1.4) The Green Paper presents two questions concerning bundling. Question 8 is whether bundling the card scheme with transaction processing is problematic, and if so why. Question 9 asks if action should be taken on this issue, such as requiring operational separation or separate ownership of card schemes and transaction processing.

7 As noted in the Appendix, the exclusivity and routing provisions of the Durbin Amendment do not apply to three-party networks where the same entity acts as network and issuer.
In the United States, MasterCard and Visa provide transaction processing for their credit cards. A number of independent processors process debit card transactions. In particular, Visa has had a “no-bypass” rule that requires the use of its transaction processing.

The bundling of card schemes and transaction processing has been challenged both in private litigation and by legislation. In 2002, First Data Corporation, a transaction processor, sued Visa USA arguing that the no-bypass rule was anticompetitive. In 2006, the companies settled their suit without a court’s ruling on the legality of the rule. The U.S. antitrust agencies have not challenged the no-bypass rule. As discussed in the Appendix to these Comments, the Durbin Amendment to the Dodd-Frank Act requires issuers of debit cards to permit those cards to access two or more unaffiliated networks for processing transactions. As required by the Dodd-Frank Act, the Federal Reserve has issued rules prohibiting network exclusivity arrangements and routing restrictions for certain debit cards.

Bundling, such as the bundling of credit card schemes and transaction services, may have anticompetitive effects under some circumstances. Bundling may have anticompetitive effects if there is market power in at least one of the services being bundled and if the bundling increases, extends, or entrenches that power.

The Green Paper in particular is concerned with the possibility that the bundling of card schemes and transaction processing would raise barriers to entry. Bundling raises barriers to entry if it would be substantially harder to enter both card schemes and transaction processing at the same time than it would be to enter them separately and if the result of the bundling was that potential entrants into one service could not find a partner that produced the other service.

The bundling of some card schemes with transaction processing would not necessarily make it harder for new card schemes to develop. Even if some card schemes required the use of

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8 See K. Craig Wildfang and Ryan W. Marth, *The Persistence of Antitrust Controversy and Litigation in Credit Card Networks*, 73 *Antitrust Law Journal* No. 3 (2006), at 704. The First Data case is not discussed in the Appendix to these comments because the litigation concluded with no final court decision.


10 The network exclusivity prohibitions become effective on April 1, 2012 for issuers, and October 1, 2011 for networks. Federal Register, Vol. 76, No. 139, Wednesday, July 20, 2011, at 43394. Note that these rules do not apply to credit cards or debit cards issued by three-party schemes.
their own transaction processors, independent transaction processors might survive by dealing with other schemes, and new card schemes could partner with those processors.\(^\text{11}\)

Bundling also may increase efficiency. For example, card schemes may find that requiring all transactions to be processed through their subsidiary enables them to maintain a high quality of service to merchants and cardholders. High quality transaction processing services are likely to be important to the card scheme’s ability to compete with other schemes and payment methods. Given the possibility of efficiencies through bundling, the Commission may prefer to judge a card scheme’s restrictions on the processors that issuing and acquiring entities can use on a case by case basis, rather than requiring either operational separation or different ownership of card schemes and transaction processing.

4. **Information on the availability of funds (Green Paper 4.1.7)**

The development of innovation across the full spectrum of potential payments systems likely requires access by all players (who meet requisite information security standards) to key information (like bank account information). A significant segment of the population, however, is moving toward stored value/prepaid payment solutions. As these payment solutions become more accessible, the need for bank account information lessens as bank account authorization is not needed to secure this type of payment.

For payment methods that require or would benefit from account authorization, protecting the bank accounts themselves as well as bank account information from fraudulent or careless actions is a significant consumer protection concern. Bank account owner consent that includes disclosure of who, how and what information is accessed, as well as to what use the accessed information is put, should therefore be mandatory so consumers know who is accessing their information and to what use it is put.\(^\text{12}\) However, the nature of the consent required should be balanced against the recognition that significant payment transactions over the internet or in the cloud are now commonplace and consumers therefore release personal information all the time, sometimes without knowing exactly where it is going or if/how it is being stored. Thus, the

\(^{11}\) Transaction processing companies include FIS Global, First Data, and Pulse. Pulse is part of Discover Financial Services, which also offers the Discover Card.

\(^{12}\) The Sections note that data subjects’ consent is required for processing of and access to personal data under existing EC Directive 95/46/EC and the new General Data Protection Regulation proposed by the Commission on January 25, 2012.
risk associated with privacy/fraud prevention concerns surrounding allowing nonbank access to consumer account information solely for the purpose of payment verification may be outweighed by the desirability of access to verify the payment. In other words, it is possible that consumers have reached a point where securely sharing bank account information with third parties involves no greater risk than sharing other types of information, such as credit card numbers. A critical issue to address in this context is, therefore, the extent to which consumers have demonstrated through their actions or direct consent that they approve of the sharing of such information.

On the issue of security in the disclosure transaction, it seems that effective technological security measures are already in place to protect information if access is required. For example, mobile payment systems under development (e.g., ISIS) or in use (e.g., Google wallet) essentially substitute the smartphone for a credit card with the sensitive card data physically in a secure element chip in the mobile device. This approach requires involvement of a TSM (trusted services manager) to handle provisioning of card data onto consumers' mobile phones. Except for the introduction of the TSM, this mobile payment approach is essentially the same structure as the current card structure. TSM’s are trusted with sensitive payment data.

This is not to say that limits on the information merchants can collect from customers are not required. U.S., state, and federal data privacy laws restrict the type of information merchants can collect, as do payment network rules or contract provisions. For example, some state laws prevent a brick and mortar merchant from collecting personal information such as zip code, addresses, etc. as a condition of accepting credit cards for payment. These laws are directed, however, toward preventing unauthorized use of this information, and U.S. laws do recognize that under certain circumstances, merchants need access to this information to prevent fraudulent transactions. Online transactions are an example—whereas demographic information may not be necessary to prevent a fraudulent in-person credit card transaction, it may be necessary to prevent fraud in an online transaction. In developing an effective consumer policy that at the same time is not overly burdensome on merchants, a careful balance must be struck between preventing the disclosure of unnecessary information against the amount of information necessary to prevent fraud. U.S. laws have struck this balance by limiting the use to which merchants can put the information collected. For example, a merchant who obtains a zip code for purposes of fraud prevention cannot then use that zip code for marketing purposes.
If access is necessary, appropriate consumer disclosures seem to strike the appropriate balance by alleviating the majority of the dangers associated with the collection and use of personal consumer information. For example, use of online privacy policies that disclose to the consumer the nature of the information collected as well as the use to which that information will be put, are commonplace and enforceable in the U.S. Another example is the recent Google Buzz settlement, which contained Safe Harbor privacy principles that require companies that receive European personal data in the U.S. to give the individuals to whom the information pertains notice of how the company uses their personal information. These individuals must also be permitted to direct the company to refrain from sharing the information with certain third parties and the opportunity to opt out of having their information used for purposes incompatible with those for which the information was collected or to which they have consented.

5. Transparency and restrictive card scheme rules (Green Paper 4.2)

The issue of transparency and merchant-related network rules has arisen in the United States in the context of private and government litigation and recent regulation as described above. Access to information about the cost of using cards, and use of that information to steer consumers to lower cost payment choices, was one subject of the government’s action against American Express, Visa, and MasterCard, and part of the resulting settlement with Visa and MasterCard. Visa and MasterCard have both published interchange rate information for some time, but merchants have sought additional, real-time information. In addition, private litigants have challenged three and four-party networks’ surcharge and non-discrimination rules, among other rules surrounding merchant conduct. Litigation is still underway that may impact the operation of these payment schemes going forward.

Whatever approach the Commission adopts in relation to transparency and rules, any proposed changes to merchant-related rules should be viewed in the context of the networks’ rules as a whole, as they are interrelated.

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14 See, e.g., In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation, 1:05-md-1720-JG-JO (E.D.N.Y.); In re American Express Anti−Steering Rules Antitrust Litigation, 1:11-md-02221-NGG-RER (E.D.N.Y.), infra at pages 16-20.
Consumer/Merchant Transparency

The Green Paper asks whether consumers should be aware of the fees paid by merchants for various forms of payment. Consumer transparency into fees paid by merchants is largely untested in the United States as it is currently the subject of ongoing litigation, where it is typically addressed in conjunction with the debate over payment-card surcharging.\(^\text{15}\) Generally, transparency in consumer transactions is typically favored over the alternative. The question is the degree of transparency a particular situation warrants, as there may be circumstances where complete transparency, while perhaps beneficial for the consumer, would adversely affect a competing, yet equally compelling, interest. For example, disclosing to the consumer the fee paid by a merchant for a particular payment service may influence consumer choice and thereby stimulate competition in the payment services markets toward lower cost cards and/or services. However, without allowing merchants to pass on or compensate for interchange and other fees through surcharging or discounting, simply permitting or mandating disclosure of such information may have no significant influence on consumer behavior.

While merchants in the United States are allowed to publicize the costs of accepting particular payment schemes at the point of sale, it is uncommon to see such information posted. It may be that the apparent reluctance to post this information is due to uncertainty and confusion on the part of some merchants as to whether such practices are permitted under existing card scheme rules. Alternatively, merchants may see no benefit to disclosing costs, which are effectively a cost of doing business, so as to allow their customers the choice and convenience of several payment options. It may also be that the transaction costs associated with transparency are significant enough to merchants to outweigh their benefit to consumers.

Merchant/Payment Provider Transparency

In connection with the consent decree resolving the U.S. Department of Justice’s action against Visa and MasterCard, those schemes each agreed to provide a look-up service that a merchant can access at the point of sale to obtain interchange rate information in order to determine whether to offer a discount to a consumer for the use of alternative payment methods. Look-up services are currently in the implementation phase, so as yet there is insufficient

\(^{15}\) In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation, discussed infra.
experience to assess whether this additional information will aid merchants’ efforts to direct consumers to lower cost payment methods.

**Surcharging and Non-Discrimination Policies**

As discussed in the Appendix, the MasterCard and Visa no-surcharge rules, the three-party networks’ “equal treatment” contractual provisions, and the consumer protection laws of ten U.S. states that prohibit surcharging have effectively barred credit card surcharging, but not discounting, by U.S. merchants. Although, as discussed above, the merchant plaintiffs in the *In re Payment Card* litigation have challenged the legality of Visa’s and MasterCard’s “no surcharge” rules, and the Department of Justice has an ongoing enforcement action concerning the three-party networks’ “equal treatment” contractual provisions, that litigation is ongoing and has not resulted in a decision on the merits of these claims. Moreover, even if the resolution of this litigation were to permit some form of surcharging, given that surcharging is banned under the laws of ten U.S. states (including some of the largest states, like New York and California), it is unclear whether this outcome would result in significant merchant surcharging in the United States.

For these and other reasons, as described in the Appendix, the U.S. Department of Justice and state Attorneys General have focused their regulatory enforcement efforts on the three and four-party networks’ rules and contractual provisions that allegedly prevent discounting for favored forms of payment and other “steering” practices, rather than rules against surcharging. The consent decree resolving the enforcement action against MasterCard and Visa permits merchants to steer consumers to lower-cost forms of payments by offering a discount, but does not permit merchants to impose surcharging. As the Department of Justice explained in announcing its settlement with MasterCard and Visa, the “Antitrust Division … investigated a number of Defendants’ other merchant rules, including the prohibition on surcharging,” but the Division concluded that the “prohibitions and requirements [concerning the networks’

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*16 In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation, 1:05-md-1720-JG-JO (E.D.N.Y.), infra at 16.*
discounting and no-discrimination rules] contained in the proposed Final Judgment … fully address[ed] the competitive concerns set forth in the Complaint against Visa and MasterCard.”

The Sections observe that establishing a surcharging scheme that reflects a “user pays” concept is not straightforward. As the Commission knows, multi-sided markets, such as those in payment instruments, pose particular complexities for determining on which side costs should appropriately be borne. Various economic benchmarks have been proposed to set payment-card interchange fees, such as the “tourist test” or the “merchant indifference test.”

Although there has been no U.S. experience on surcharging, the Sections observe that the level and equality of surcharging has proved complex to assess and monitor in other jurisdictions, notably Australia. As the Commission no doubt is aware, the Reserve Bank of Australia has recently issued Consultation Documents that address the concern that some merchants in Australia (e.g., airlines) have assessed surcharges in excess of those merchants’ acceptance costs and have applied the same surcharges to all credit card transactions, notwithstanding that different credit cards carry different acceptance costs. In general, the experience in Australia suggests that merchants in competitive industries are less likely to surcharge, whereas those merchants who appear to have significant power over consumers may be more likely to impose surcharges on their customers.

This experience suggests that any consideration of permitting or promoting surcharging will need to address whether and how to require limitations on surcharging. Any consideration of permitting or promoting surcharging should consider the challenges of monitoring merchant compliance with any regulatory limitations.

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19 See, e.g., Jean-Charles Rochet and Jean Tirole, Must Take Cards: Merchant Discounts and Avoided Costs, JOURNAL OF THE EUROPEAN ECONOMIC ASSOCIATION June 2011. The Sections understand that this benchmark has been used by the Commission in its settlement with Visa concerning debit MIFs. See Commission press release IP/09/515, April 1, 2009; Case No COMP/39.398 – Visa Europe, Commitments offered to the European Commission pursuant to Article 9 of the Council Regulation (EC) No 1/2003
Finally, to the extent that cost-based surcharging is permitted, transaction costs associated with mobile and e-payments may be lower than those associated with credit and debit card transactions. Accordingly, the technological advancement of these payment methods and their increased acceptance may act essentially as new entrant in the market and serve to lower fees overall.

**Honor-all-cards rules**

As described in the Appendix, private and government litigation in the U.S. has challenged certain aspects of the honor-all-cards rules of both the three and four-party networks.

MasterCard’s and Visa’s honor-all-cards rules were previously amended in the U.S. as part of the settlement of the *In Re Visa Check* litigation to permit merchants to accept signature debit cards or credit cards, or both.\(^\text{20}\) Since the settlement of that litigation in 2003, the vast majority of merchants have chosen to accept both MasterCard and Visa credit and signature debit cards. However, in recent years, certain merchants and merchant trade associations complained that debit card interchange rates remained above competitive levels notwithstanding the *In re Visa Check* resolution, and they actively lobbied the U.S. Congress for legislation that would regulate debit card rates. This effort culminated in the Durbin Amendment (described in the Appendix), pursuant to which the Federal Reserve has capped interchange rates applicable to certain debit card transactions.\(^\text{21}\) No other litigation or regulatory action has otherwise altered the four-party networks’ honor-all-cards rules, nor have the networks modified those rules in the U.S. since the *In re Visa Check* settlement. Finally, *In re American Express Merchants’ Litigation* is ongoing and therefore has not altered the American Express honor-all-cards rule.\(^\text{22}\)

In defending their honor-all-cards rules in U.S. proceedings, the four-party payment card schemes have raised two potential concerns: the risk of consumer confusion and the potential impact on smaller card-issuing banks. With respect to consumer confusion, honor-all-cards rules have historically been a standard feature of payment card systems, and the networks believe that

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\(^{20}\) *In re Visa Check/MasterMoney Antitrust Litigation*, No. CV-96-5238 (E.D.N.Y.), infra at 15.

\(^{21}\) *Infra*, page 24-25.

consumers have come to expect that merchants will honor all cards bearing a particular payment brand. Altering such rules might lead to consumer confusion as to which cards of a particular payment brand can be used at particular merchant locations. Conversely, the merchants argue that allowing individual merchants to refuse to accept particular payment cards is an important aspect of their ability to steer customers to the lowest-cost payment option, and that customers are unlikely to be confused or disadvantaged because of the plethora of payment options available to them.

With respect to the impact on smaller card-issuing banks, one of the main justifications for the maintenance of the four-party schemes’ honor-all-cards rules has been their promotion of smaller card-issuing banks to compete with larger issuers, because the schemes’ rules require that cards bearing the four-party schemes’ brands be accepted regardless of which bank issued the card. Without the honor-all-cards rule, arguably smaller issuers could have a more difficult time negotiating “universal acceptance” of their cards.

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The Sections appreciate this opportunity to comment on the Commission’s Green Paper and hope that our description of the current state of affairs in the U.S. and the positions put forward by the various constituencies will be helpful as the Commission considers ways to foster European integration of payment systems.
APPENDIX

OVERVIEW OF PRIVATE AND GOVERNMENT LITIGATION AND REGULATORY REVIEW OF ELECTRONIC PAYMENTS IN THE UNITED STATES

Given that many of the payment system issues the Green Paper addresses have been the subject of regulatory review and private and government litigation in the U.S. over the past thirty years, we thought it would be helpful to summarize the most relevant U.S. proceedings, which are referenced in portions of the specific comments to the Green Paper. The Sections take no position on the merits of any of the claims or defenses that have been asserted by any parties to any of the litigations described below.

A. Private Litigation

1. Private Litigation Involving Four-Party Networks

a) National Bancard Corporation v. Visa U.S.A., Inc. (“NaBanco”)

In 1979, the payment card transaction acquirer NaBanco sued Visa in the United States District Court for the Southern District of Florida, alleging that Visa’s setting of default interchange rates violates the Sherman Act. Visa won the case after a nine-day trial, and the trial court’s decision was affirmed on appeal.23

At the time, the Visa network was a member association, and Visa’s board of directors was comprised of executives from certain of Visa’s member banks.24 The Visa board had authority to establish default interchange rates on Visa transactions. NaBanco claimed the board’s setting of interchange fees amounted to an agreement among the banks that issue Visa-branded cards to fix the fee acquiring banks pay them on each transaction. NaBanco accordingly sought to enjoin Visa from setting default interchange fees; to the extent any interchange fee was necessary or appropriate, NaBanco contended it should be determined through individual negotiations between acquiring and issuing banks.25 Visa responded that setting default interchange rates was an essential feature of a four-party payment system. Without a default

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23 NaBanco, 596 F. Supp. 1231 (S.D. Fla. 1984), aff’d, 779 F.2d 592 (11th Cir. 1986).
24 In 2008, Visa became a public company with an independent board of directors.
system, an issuer and acquirer on a Visa card transaction would not know in advance what financial terms would apply to the exchange of that transaction; as a result, these financial institutions would be required to engage in thousands of bilateral negotiations, which would undermine the efficiency and cohesion of the Visa network. Default interchange eliminates this inefficiency and, as a result, facilitates competition among Visa’s member banks for the business of cardholders and/or merchants.26

Analyzing Visa’s default interchange system under the rule of reason, the Court found NaBanco failed to prove that Visa violated the antitrust laws. The court found that Visa’s default interchange system did not restrain competition because default interchange fees were not mandatory; rather, member banks were free to negotiate bilateral agreements for an alternative fee structure. The court also agreed with Visa that default interchange fees were necessary to the proper functioning of the Visa system, which would be rendered inefficient and ineffective if the exchange fees applicable to card transactions had to be negotiated through bilateral agreements among Visa’s numerous financial institutions. Another factor in the decision was that at the time of this decision, the Visa network was less than a decade old; the court noted that default interchange was necessary as it “enables VISA to exist as a viable competitor in the payment systems market.”27 In more recent litigation, plaintiffs have raised the question whether the NaBanco case would be decided the same way today.

b) In re Visa Check/Mastermoney Antitrust Litigation

In 1996, Wal-Mart and a number of other retailers filed class action lawsuits against Visa and MasterCard in the United States District Court for the Eastern District of New York, challenging the networks’ “honor-all-cards” rules as they related to the acceptance of certain forms of debit cards. Plaintiffs’ central allegation was that Visa and MasterCard’s honor-all-cards rules were illegal tying arrangements that forced merchants that wished to accept Visa and MasterCard credit cards also to accept Visa and MasterCard debit cards, in violation of Section One of the Sherman Act. Class Plaintiffs contended that these practices eliminated competition among debit card networks and resulted in super-competitive interchange fees on MasterCard

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26 Id. at 1236.
27 Id. at 1261.
and Visa debit and credit card transactions. The plaintiffs sought treble damages and an injunction against the alleged tie, among other relief.28

Visa and MasterCard responded that their respective honor-all-cards rules were pro-competitive and critical to the functioning of their four-party networks. Each network contended that two related guarantees are critical to its payment system: (i) the guarantee to consumers that any card bearing its brand logo will be accepted at any merchant where the logo is displayed, and (ii) the guarantee to participating merchants that they will be paid for any transaction on cards bearing the network’s logo. The honor-all-cards rules, the networks argued, are the source of those guarantees, because they ensure that MasterCard and Visa payment cards will be honored regardless of which bank issued the card or whether the consumer will be funding its purchases via a line of credit or payment from a bank account. The networks also argued that plaintiffs failed to demonstrate that the honor-all-cards rules foreclosed competition in any relevant market, since merchants are free to accept and even promote other forms of payment, including other competing debit card networks.

The parties settled the case in 2003. Under the settlement, MasterCard and Visa agreed to amend their respective honor-all-cards rules to permit U.S. merchants to accept all MasterCard and/or Visa credit cards, all MasterCard and/or Visa debit cards, or both. The networks also agreed to make monetary payments and reduce interchange fees applicable to their debit card transactions for a five-month period.29 The settlement provided for no other modification of the networks’ honor-all-cards rules, and the networks have not otherwise modified those rules since the settlement.

c) In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation

Starting in June 2005, various merchants filed a series of lawsuits against MasterCard, Visa, and several banks that issue MasterCard and Visa payment cards, alleging that MasterCard’s and Visa’s setting of default interchange fees and various network rules violate the Sherman Act. The cases were consolidated in the United States District Court for the Eastern

District of New York. The case is still pending, with trial currently scheduled for September 2012.

Much like in *NaBanco*, Plaintiffs claim that Visa’s and MasterCard’s default interchange rates applicable to credit and debit card transactions constitute agreements among the networks’ member banks to fix the price merchants ultimately pay to accept the networks’ payment cards. Plaintiffs allege that, absent the networks’ practice of setting default interchange rates, issuers would be required to compete with one another with respect to negotiating interchange rates with acquirers and their merchant customers, which would result in lower acceptance costs for merchants, perhaps as low as zero. At the time plaintiffs filed these actions, MasterCard and Visa were member associations, so plaintiffs’ price-fixing allegations focus on that membership structure, which they characterize as a “walking conspiracy.” Plaintiffs contend that the effect of this conspiracy has continued since the networks restructured as public companies (MasterCard in 2006 and Visa in 2008).

Plaintiffs also allege that MasterCard and Visa have maintained rules that prevent merchants from “steering” cardholders to lower-cost transactions, and these rules contribute to the networks’ maintenance of supra-competitive interchange rates. These alleged rules include, among others (1) no surcharge rules – which prevent merchants from adding a surcharge to MasterCard and Visa card transactions at the point of sale; (2) honor-all-cards rules (described above); and (3) the so-called “multi-issuer” rules – which plaintiffs contend prohibit issuers from issuing payment cards that can be used to conduct transactions over competing networks (e.g., by offering multiple credit card brands or multiple debit card brands on a single card).

Defendants argue that the networks’ default interchange and merchant rules are pro-competitive and do not restrain competition in any relevant market. Defendants assert that, as *NaBanco* held, default interchange is critical to a four-party network, as it permits the thousands of participating issuing and acquiring financial institutions to exchange transactions with advance knowledge of the terms under which those transactions will be handled. Defendants also argue that default interchange cannot restrain competition, because it is not mandatory;

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30 *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, 1:05-md-1720-JG-JO (E.D.N.Y.).

rather, default rates apply only where the issuer and acquirer on a transaction do not have a bilateral agreement on the fees or other terms that apply to the particular transaction.

Defendants also contend that surcharging and related rules are necessary to protect the networks’ brands and the value they deliver to consumers and merchants. Defendants argue that consumers perceive a surcharge as a penalty for the use of a payment card, which denigrates the payment card brand and diminishes the network’s value to cardholders and merchants. The networks also argue that a merchant that surcharges engages in free-riding by accepting MasterCard and Visa-branded cards to attract cardholders and the additional sales they bring, but subsequently transferring the cost of accepting those cards to consumers. They also assert that merchants have the ability to steer consumers even in the absence of surcharging, by offering discounts or otherwise promoting competing card brands. In addition, defendants argue that the no-surcharge rules are consistent with the laws of ten states in the U.S. that prohibit surcharging.32

MasterCard and Visa have defended their honor-all-cards rules in this action consistent with their position in In re Visa Check, described above. Finally, defendants contend the so-called “no multi-issuer rule” (i) is designed to avoid the brand confusion that would result from having multiple credit card brands on the same card and (ii) does not restrain competition, because issuers are free to issue and promote multiple competing card brands, albeit on separate cards.

2. Private Litigation Involving Three-Party Networks

a) In re American Express Merchants’ Litigation and Related Actions

Since July 2003, various merchants have filed a series of suits in the United States District Court for the Southern District of New York, challenging American Express’s alleged honor-all-cards policy.33 Plaintiffs specifically claim that American Express’s honor-all-cards policy constitutes an illegal tying arrangement that forces merchants that wish to accept

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32 Ten states have statutorily prohibited surcharges on credit card payments: New York, California, Texas, Florida, Connecticut, Massachusetts, Maine, Oklahoma, Kansas, and Colorado. These laws were adopted to combat “bait-and-switch” conduct on the part of merchants. Merchants retain the ability in these states to discount for cash.

American Express’s charge cards also to accept its revolving credit cards in violation of Section One of the Sherman Act. Plaintiffs claim that charge cards (which include the American Express Green, Gold, and Platinum cards) comprise a market separate from the market for credit cards (which includes the American Express Optima and Blue cards), that American Express has market power in the charge card market, and that American Express has used its market power to force merchants to accept its credit cards at the same discount rate merchants pay to accept American Express charge cards. 34 Plaintiffs contend that absent the tie, merchants would not agree to pay the same discount rate for American Express credit cards, because the holders of those cards are less affluent and spend less than consumers that use American Express charge cards. The plaintiffs in these actions seek injunctive relief and an unspecified amount of damages. 35

American Express has responded that its honor-all-cards policy is critical to the value of the American Express brand because it ensures that consumers who carry American Express cards have the same experience at the point of sale regardless of the particular card used. Moreover, American Express contends that the four-party systems also have honor-all-cards rules applicable to all their credit and charge cards, that charge and credit cards compete in the same product market (and are a single product for purposes of tying law), and that there is no merchant demand to accept charge cards but not credit cards, so that there can be no claim of an illegal tie. American Express has also argued that it does not have market power in any relevant market and that plaintiffs’ allegations ignore the two-sided nature of the payments card market. In addition, American Express argues that the honor-all-cards provisions are procompetitive because, among other things, they are necessary to protect the value of its brand by ensuring that consumers who carry American Express cards have the same experience at the point of sale regardless of the particular card used, they prevent merchant free-riding, and they foster interbrand competition for both issuers and co-brand partners.

Certain of these cases have been delayed pending the final outcome of an appeal concerning whether the plaintiffs’ claims are subject to mandatory arbitration clauses in the

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35 Id.
merchant agreements with American Express. The remaining case is awaiting a decision on cross-motions for summary judgment currently before the court.

b) **In re American Express Anti-Steering Rules Antitrust Litigation**

Since 2005, various merchants have filed lawsuits against American Express in the United States District Court for the Southern District of New York, alleging that the company has maintained rules (and provisions in contracts with merchants) that prevent merchants from steering cardholders to use forms of payment other than American Express. The plaintiffs seek injunctive relief and unspecified damages. The litigation remains pending.

Plaintiffs claim that American Express maintains rules and contractual provisions that prohibit merchants from, among other practices, indicating or implying that they prefer another means of payment, dissuading card members from using their American Express cards, prompting card members to use another means of payment, imposing any restriction, condition, or disadvantage on American Express transactions that are not imposed equally on other payment products (e.g., a surcharge), and engaging in other practices that harm the American Express brand. According to the complaint, in the absence of these “anti-steering rules,” merchants would be able to offer consumers incentives to use payment products that carry lower merchant discount fees.

American Express asserts that it lacks market power in any relevant antitrust market, and that plaintiffs’ allegations ignore the two-sided nature of the relevant market. American Express also asserts that the non-discrimination provisions in its contracts are necessary and pro-competitive because, among other things, they protect consumer choice and protect American Express from free riding and bait-and-switch tactics. American Express also asserts that the requested relief would disproportionately harm American Express’s ability to compete with the

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four-party schemes. No decision has been reached on the merits of the parties’ claims or defenses.

B. Government Enforcement


In October 2008, the Antitrust Division of the Department of Justice (DOJ) issued a civil investigative demand to MasterCard, Visa, and American Express for information regarding certain rules governing merchant acceptance of these networks’ payment cards; the Attorneys General for seven States subsequently requested similar information. Following its investigation, the DOJ and state Attorneys General filed suit against all three networks, alleging that various network rules or contractual provisions – referenced as “Merchant Restraints” – restrained competition among payment card brands by effectively preventing merchants from steering cardholders to use a lower cost or otherwise preferred form of payment. The so-called “merchant restraints” at issue include networks rules that prohibit merchants from offering discounts at the point of sale for use of a particular card or bar other “discrimination” in favor of a competing card brand. The complaint further alleges that the “Merchant Restraints leave merchants less able to avoid Defendants’ supra-competitive prices than they otherwise would be.”

On the same day that the agencies filed the complaint, they announced a settlement with MasterCard and Visa. The resulting Consent Decree bars MasterCard and Visa from prohibiting merchants from offering discounts at the point of sale to encourage consumers to use a competing payment card brand, but it does not alter MasterCard’s and Visa’s no surcharge rules. More specifically, the Consent Decree provides that Visa and MasterCard may not prevent merchants from “(1) offering the Customer a discount or rebate, including an immediate discount or rebate at the point of sale… (2) offering a free or discounted product if the Customer uses a

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39 The states joining the DOJ’s action were Arizona, Connecticut, Idaho, Illinois, Iowa, Maryland, Michigan, Missouri, Montana, Nebraska, New Hampshire, Ohio, Rhode Island, Tennessee, Texas, Utah, and Vermont.
particular … Form of Payment … other than the General Purpose Card the Customer initially presents; (3) offering a free or discounted or enhanced service if the Customer uses a particular … Form of Payment … other than the General Purpose Card the Customer initially presents; (4) offering the Customer an incentive, encouragement, or benefit for using a particular … Form of Payment … other than the General Purpose Card the Customer initially presents; (5) expressing a preference for the use of a particular Brand or Type of General Purpose Card or a particular Form of Payment; (6) promoting a particular Brand or Type of General Purpose Card or particular Form or Forms of Payment …; (7) communicating to a Customer the reasonably estimated or actual costs [of payment forms]; or, (8) engaging in any other practices substantially equivalent to the practices [described above].”41 The settlement also permits Visa and MasterCard to enter into negotiated exclusive acceptance agreements and exclusive steering agreements with merchants, in which merchants agree to steer customers exclusively to Visa or MasterCard cards.

The Court approved the settlement on July 20, 2011, thereby discontinuing the action against MasterCard and Visa.

The DOJ case against American Express is ongoing, and its proceedings have been coordinated with the private In re American Express Anti-Steering Rules Antitrust Litigation discussed above. American Express denies DOJ’s allegations.

C. Congressional Review

1. Durbin Amendment

On July 21, 2010, President Obama signed into law the financial reform legislation known as Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”).42 Dodd-Frank includes what has become known as the Durbin Amendment (“Durbin”), which amends the Electronic Fund Transfer Act to add certain provisions governing the electronic payments industry. Durbin (i) requires that interchange fees on debit or prepaid card transactions be “reasonable and proportional” to the incremental costs incurred by an issuer or payment card


networks for such transactions; and (ii) eliminates or modifies certain payment card network rules that purportedly restrict merchant payment card acceptance practices. The Durbin Amendment assigns regulation of these matters to the Board of Governors of the Federal Reserve (“Federal Reserve”).

a) Debit and Prepaid Interchange

Durbin requires that interchange fees on debit and prepaid card transactions shall be “reasonable and proportional” to the actual cost incurred by the issuer or payment card network in connection with the transaction; Durbin tasks the Federal Reserve with issuing regulations to identify and measure these costs and calculate a permissible fee. Durbin specifically directs the Federal Reserve to distinguish between the actual incremental cost incurred in the authorization, clearance, and settlement of a particular debit transaction (which can be included in the cost assessment) and other costs not specific to a particular transactions, such as administrative overhead, research and development, system creation, and maintenance costs (which must be excluded from the cost assessment.) Durbin also required the Federal Reserve to consider similarities between electronic debit transactions and paper check transactions when establishing interchange fee regulations.

On June 29, 2011, the Reserve Board issued its final regulations: debit interchange fees were capped, per transaction, at 21 cents plus 0.05 percent of transaction value. Previously, the average interchange fee on a debit card transaction was approximately 44 to 45 cents per transaction. Durbin permits an adjustment to this fee cap for recovery of certain fraud prevention costs. It also exempts small issuers (with less than $10 billion in assets) and certain government-administered benefit card and general-use prepaid card programs from the

43 Dodd-Frank Act, Section 920, Reasonable Fees and Rules for Payment Card Transactions (2010) (Durbin Amendment).
44 Durbin Amendment, Section 920(a)(2).
45 Durbin Amendment, Section 920(a)(4).
48 Eamon Murphy, How Durbin’s Debit Fee Cut Backfired on Small Merchants, Daily Finance, 1 (December 8, 2011).
interchange transaction fee restrictions. Note that the regulations apply only to interchange fees, which are a feature of four-party payment schemes. Three-party schemes, where the same entity acts as both the network and issuer, are not “payment card networks” as defined in the statute.

Many have expressed concern about the unintended consequences of rate regulation, which they believe will include higher fees and costs for consumers, and a reduction in the availability of debit card products, benefits and services.

b) Limitations on Certain Payment Card Network Rules

Durbin also imposed new limitations on certain payment card network rules on payment card acceptance practices. Particularly relevant to the Green Paper, Durbin prohibits: so-called (i) “Network Exclusivity Arrangements” and (ii) “Merchant-Directed Routing Restrictions.”

Network Exclusivity Arrangements. Durbin prohibits network exclusivity arrangements between a debit card issuer and a payment card network (or affiliated group of payment card networks) in which the issuer’s debit cards offer access to only a single payment card network or a single group of affiliated networks. As a result, the network’s and issuer’s rules must permit debit cards to access two or more unaffiliated networks for processing electronic debit transactions on that card. Moreover, payment card networks cannot limit or restrict competing marks from appearing on a card bearing the network’s debit card marks.

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49 Durbin Amendment, Sections 920(a)(5), 920(a)(6), 920(a)(7).

50 In regulating only interchange fees, the Federal Reserve Board of Governors noted that “[m]erchants are able to protect themselves from excessive fees in three-party systems by negotiating directly with the issuer-system operator, unlike in the case of four-party systems, where a network intervenes between the issuer and merchant.”


53 See Section 920(b)(1)(A).

54 Id.
Merchant-Directed Routing Restrictions. Durbin provides that a payment card network may not “inhibit the ability of any person who accepts debit cards for payments to direct the routing of electronic debit transactions for processing over any payment card network that may process such transactions.”55 In effect, merchants now have the ability to route electronic debit transactions to the path that would result in the lowest cost to the merchant.

As with the interchange caps described above, the Federal Reserve, in its regulations implementing the Durbin Amendment, concluded that these routing provisions do not apply to three-party networks where the same entity acts as both the network and issuer.56

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55 Durbin Amendment, Section 920(b)(1)(B).