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E-Payment Network Directors Risk Antitrust Scrutiny, Lawsuits

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Members of a board, committee, advisory group, or other governing body of an electronic payment network should take heed. If they are not careful, they may find themselves, and their financial institution employers, on the wrong side of an antitrust investigation or lawsuit.

The risk arises from both the conduct and the composition of these groups. The typical electronic payment network governing body comprises, at least in part, people employed by financial institutions that compete with one another, compete with the network itself, or participate in competing networks. Through group meetings at which confidential and competitively sensitive information is exchanged, these governing bodies determine, or try to influence, the pricing, business strategy, and development efforts of their respective networks.

From a stark antitrust perspective, these network governing bodies are simply a group of competitors meeting to collectively determine the pricing and other competitive attributes of the products they sell in competition with one another. This is the world of electronic payment networks — a true anomaly in corporate America.

Typically, any gathering of competitors to discuss pricing and other competitively sensitive information raises questions and caution flags in light of antitrust law. And certainly any agreement among competitors to fix prices, allocate markets or customers, restrict product output or development, or boycott or refuse to do business with any entity, would ordinarily be a per se violation of antitrust law.

However, to date, the electronic payments industry operates as if it has received an explicit waiver of this rule. Nearly 15 years ago, two cases touched on the topic. In Nabanco v. Visa, a challenge to Visa's credit card interchange structure was rejected. And in the Pulse EFT Association arbitration, an arbitrator found that Pulse's setting of uniform interchange fees was illegal price fixing unless the network also permitted its members individually to offer rebates and impose surcharges.

Since then, there has been no broad-based challenge to the fixing of point-of-sale debit, ATM, and credit card interchange rates by the financial institution members of electronic payment networks. Nor has anyone directly challenged the network governance structure that is commonplace in the industry — namely, groups of competing financial institutions collectively running, or substantially influencing, the operations and business strategy of the networks.

Comfort taken from any of this precedent would be false. The supposed safe harbor for electronic payment networks is far from impregnable, and certainly open to further examination. This is particularly true in the current landscape, in which lawsuits and government investigations abound. So it is very important that financial institution representatives take precautions with respect to their participation on any payment network governing body.

They should be especially careful that they do not in any way compromise their participation by using it to gain or share confidential information for purposes unrelated to their work on the governing body. These precautions are necessary to protect

not only the network but also the people who participate on a network governing body and the financial institutions that employ them.

The most effective way to ensure that the proper precautions are taken is for the governing body member to enter into a confidentiality agreement with the network that governs the member's use and treatment of the confidential information obtained through his or her participation on the body. The "confidential information" covered by this agreement should be given the broadest meaning possible. It should be defined to cover any nonpublic information about the payment network's past, current, or future operations that is obtained through the member's participation on the governing body, regardless of how the information was obtained.

With respect to this confidential information, the agreement should provide that the member cannot use or discuss the information:

- In any way that will harm the network.
- For any purpose not directly related to participation on the network governing body.
- With anyone who is not a member of the network governing body, employed by the network, or employed by the member's financial institution employer.
- With any fellow employee for any purpose not directly related to participation on the network governing body.
- With any fellow employee who also participates on a governing body of any competing electronic payment network.

The agreement should also specify that the member cannot distribute copies of any written materials obtained through participation on the network governing body.

In addition to these confidentiality rules, it is equally important that the member's conduct comply with antitrust law. For example, the member should not use participation on a governing body as a way to talk with competitors about competitively sensitive issues unrelated to the network's operations. This means that governing body members should not discuss, coordinate, or reach agreement on pricing, customers, markets, business strategy, development efforts, or other competitive issues regarding any line of business in which their respective financial institution employers compete.

It is extremely important that proper precautions be taken to comply with the confidentiality and antitrust rules. The current scrutiny of the electronic payments industry is unprecedented. The Department of Justice is suing Visa and MasterCard, challenging their practice of duality and their no-competing-cards rules; the department also has an investigation pending of Visa and MasterCard's debit card practices. The latter probe could get renewed emphasis in light of Visa's recent announcement of Interlink interchange fee increases. And the department recently opened an investigation of PIN-based debit solutions for the Internet.

On the private front, a class action was brought against Visa and MasterCard by Wal-Mart, Safeway, Sears, The Limited, Circuit City, the National Retail Federation, the Food Marketing Institute, and the International Mass Retail Association on behalf of the four million merchants that currently accept Visa and MasterCard credit and debit cards. The merchants are challenging, among other things, Visa and MasterCard's honor-all-cards rules that require merchants accepting Visa- or MasterCard-branded credit cards also to accept Visa- and MasterCard-branded debit cards. The trial is expected within six months.

Among the networks themselves, there has been a flurry of consolidation. Since 1999, Concord has bought MAC, Cash Station, and Star; NYCE Corp. acquired Magic Line and is being acquired by First Data Corp.; and Pulse bought Money Station and has a deal for Tyme. All these deals have been reviewed, or are being reviewed, by the Department of Justice and Federal Reserve, and some have required extensive investigation.

All this activity has produced a parade of subpoenas for documents and depositions, issued to every major participant in the industry, including payment networks, financial institutions, and merchants. Virtually every major financial institution in the country has, in one way or another, been the subject of some of these subpoenas in connection with one or more of the lawsuits and investigations.

The point is that everything done or said at a meeting of a network governing body may be exposed by force of subpoena. Thus, it is important that members of these bodies take appropriate precautions with regard to their participation. Taking precautions may not completely insulate them or their employers from potential antitrust liability, but it would go a long way toward minimizing the risk.

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