ASSESSING THE NEED FOR ANTITRUST IMMUNITY FOR COLLECTIVE MERCHANT NEGOTIATIONS WITH ELECTRONIC PAYMENT SYSTEMS

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I. Introduction

This paper provides an overview and analysis of legislation pending in the House and Senate to provide antitrust immunity to permit merchants collectively to negotiate with each of the major credit card systems regarding fees and rules governing merchant access to those payment systems.

Proponents[2] of legislation authorizing merchant collective negotiations argue that a grant of limited antitrust immunity is necessary to counteract the market power of Visa and MasterCard as agents for their card-issuing bank members in setting the identical "interchange fees" each card-issuing bank charges to merchants for accepting branded payment cards.[3] Further, proponents of such legislation argue that some form of backstop mechanism, such as "baseball-style" arbitration, is necessary to facilitate an agreement among the parties.

The card systems have consistently claimed that there is no market failure or antitrust violation that requires a legislative solution. And some in Congress who do see a problem with the existing system remain undecided as to the most appropriate solution.

This paper first sets out the case made for a legislative solution based upon antitrust immunity for collective negotiations between merchants and the major card systems. It then describes H.R. 5546 from the 110th Congress and the concerns before the House Judiciary Committee that led to its modification by the Committee, and concludes with a discussion of other interchange fee legislation currently pending before Congress.

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[2] The author testified on May 15, 2008 before the Task Force on Competition Policy and Antitrust Laws of the House Judiciary Committee on behalf of the Merchants Payments Coalition, Inc., in favor of H.R. 5546, the "Credit Card Fair Fee Act of 2008."

[3] Class action litigation brought by merchants raising a Sherman Act challenge to the card systems' interchange fee-setting process is pending in the Eastern District of New York. *In re Payment Card Interchange Fee & Merchant Discount Antitrust Litigation* (MDL Docket No. 05-MD-1720).

II. Interchange Fees: A Broken System that Needs Fixing

A. Interchange Fees and Card Associations' Rules Increase Merchants' Costs and Suppress Pricing Signals Regarding Merchants' Cost of Card Acceptance.

Visa and MasterCard operate payment systems whose member financial institutions perform two distinct functions. "Card-issuing" banks issue branded credit and debit cards to consumers, while so-called "acquiring banks" (which may be an affiliate of the issuing bank) deal with merchants and process authorization and payment transactions when the merchants' customers pay with a card. Visa and MasterCard license their issuing and acquiring banks and serve as the network hub for transaction processing. Most relevant to this discussion, they establish the level of interchange fees charged to merchants by each of their card issuers. These fees are deducted by the issuing bank when it forwards funds to merchants in payment for goods and services purchased by their card holders. The fees may be in excess of two percent for credit card transactions, depending on the type of card (e.g., reward or non-reward cards), the type of merchant, and the nature of the transaction (e.g., face-to-face or online). The revenue from interchange fees are not associated with any particular processing costs and appear to finance marketing efforts, such as rewards programs, by which card-issuers of the same brand compete with one another.

Visa and MasterCard do not retain any portion of the interchange fees set by those systems: they are retained in full by card-issuing banks. Interchange fees are then added to network fees charged by Visa and MasterCard themselves, as well as the acquiring banks' fees for the services they provide to merchants. The resulting fees are deducted from the amounts paid to merchants, the so-called merchant discount. Interchange fees constitute the predominant share of the merchant discount, over 75 percent for credit cards according to a recent GAO report.[4] Interchange fees have been increasing in both level and complexity, particularly as the card systems have migrated users to premium rewards cards, which carry a higher interchange fee. According to the GAO, as of 2009, Visa had 60 and MasterCard 243 interchange fee categories.[5] A recent Federal Reserve bank staff analysis found that among 13 industrialized countries where the payment card industry is well developed, U.S. merchants pay the highest interchange fees and possibly

[4] U.S. Government Accountability Office, *Rising Interchange Fees Have Increased Costs for Merchants, but Options for Reducing Fees Pose Challenges*, GAO 10-45, at 7 (Nov. 2009).

[5] *Id.* at 15. For example, a "premium" Visa card marketed to affluent individuals is likely to have an even higher interchange rate than a "classic" Visa card marketed to college students. While a large number of interchange rate categories may exist within a specific brand like MasterCard, every issuing bank for that electronic payment system imposes the same schedule of interchange rates on merchants.

the second highest merchant service discount.[6] These fees are estimated to total over $40 billion annually.[7]

In a truly competitive marketplace, merchants would be free to accept or decline various types of branded cards based on their differing interchange fees, or be free to reflect differing costs in charges to customers depending on payment type. The card associations have, however, forestalled such an outcome by requiring all merchants accepting branded cards to abide by rules requiring acceptance of all types of branded credit or debit cards regardless of differing interchange fee levels, and restricting merchants from promoting competition among payment cards by charging differing prices by brand and card type.

Indeed, the card associations appear to make every effort to ensure that card holders remain unaware of the interchange fee cost that their usage of any particular card imposes. Thus, MasterCard prohibits a merchant from providing *any* payment discount other than for cash, and also expressly prohibits merchants from charging customers for any fees they must pay to MasterCard or its members.[8] Visa permits limited discounts, so long as they don't provide an advantage to a direct Visa competitor:

> A Merchant may offer a discount as an inducement for a Cardholder to use a means of payment that the Merchant prefers, provided that the discount is:
>
> - Clearly disclosed as a discount from the standard price and
> - Non-discriminatory as between a Cardholder who pays with a Visa Card and a cardholder who pays with a "comparable card."
>
> A "comparable card" for purposes of this rule is any other branded, general purpose payment card that uses the cardholder's signature as the primary means of cardholder authorization (e.g., MasterCard, Discover, American Express). Thus, any discount made available to cardholders who pay with "comparable cards" must also be made available to Cardholders who wish to pay with Visa Cards.[9]

Moreover, Visa also imposes an "advertised price" rule which requires that:

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[6] F. Hayashi (Kansas City Federal Reserve Bank), *Payment Card Interchange Fees and Merchant Service Charges- An International Comparison*, Lydian Payments Journal, Vol. 1, No. 3, at 8, 12 (Jan. 10, 2010) (Merchant discounts in Switzerland are higher, but may decline due to a settlement with the Swiss Competition Commission).

[7] Interchange fees paid by merchants were estimated to be $42 billion in 2007. *See* H. Rept. No. 110-931, at 6 (2008).

[8] MasterCard, *MasterCard Rules* § 5.9.2 (Nov. 6, 2009), http://www.mastercard.com/us/merchant/pdf/BM-Entire_Manual_public.pdf.

[9] *Visa U.S.A. Inc., Operating Regulations- Volume I, General Rules* § 5.2.D.2 (Public Edition, Nov. 15, 2008), http://usa.visa.com/download/merchants/visa-usa-operating-regulations.pdf.

> Any purchase price advertised or otherwise disclosed by the Merchant must be the price associated with the use of a Visa Card….[10]

The apparent purpose of these advertising restrictions is to minimize the likelihood that customers will enter a store with the intention of using a payment method other than plastic. Indeed, many card holders want to use cards because they are *paid* to use them through rewards points and other enticements subsidized by the interchange fee, even though their card use imposes a burden on merchants and all of their customers. Not surprisingly, a Federal Reserve Bank staff study concluded that merchants realistically cannot refuse to accept Visa and MasterCard payment cards, regardless of interchange fee costs because of a fear that in the competitive retail marketplace, merchants would lose sales to rivals who accepted a customers' preferred card.[11]

As a result of these card system rules and practices, merchants charge the same price to their customers regardless of payment mechanism. The result is that customers who pay with cash or a non-Visa or MasterCard debit card wind up subsidizing holders of premium rewards cards for their airline miles or other benefits. Moreover, because there is no apparent cost to a premium cardholder for its use, the system encourages consumers to use higher cost payment types.

B. Proponents of Antitrust Immunity Argue That Interchange Fees and Pricing/Advertising Rules Reflect the Collective Action of the Card Issuers of Payment Systems with Market Power.

These adverse effects have not gone unnoticed abroad. Antitrust authorities and central banks in major U.S. trading partners, such as the European Union, several of its member states, and Australia, have taken action to limit the level of interchange fees and eliminate rules that restrict merchant pricing freedom with respect to differing types of payment mechanisms.[12] As discussed below, while the Justice Department successfully challenged rules that limited a card system's member banks' ability to issue payment cards of other systems, U.S. antitrust authorities have not yet challenged the interchange fee mechanism itself. This reluctance may reflect the existence of the Eleventh Circuit's 1986 decision in the *NaBANCO* case,[13] a decision from credit cards' "infant industry" days. The *NaBANCO* court found Visa's interchange fee mechanism to be a reasonable ancillary restraint imposed at a time when, "[t]he present VISA business arrangement is relatively young,"[14] and Visa and MasterCard faced the challenges of creating incentives for banks to issue their respective cards, and also for banks to recruit merchants into accepting those cards. Regardless of the validity of this holding at the time it was made, such a finding has been overtaken by the maturation of the U.S. payment card industry.

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[10] *Id.* at § 5.2.D.1.
[11] F. Hayashi, *A Puzzle of Card Payment Pricing: Why are Merchants Still Accepting Card Payments?* Kansas City Federal Reserve Bank, Working Paper WP04-02, at 42 (Dec. 2004).
[12] *See* T. Bradford, F. Hayashi, *Developments in Interchange Fees in the United States and Abroad*, Payments System Research Briefing, Federal Reserve Bank of Kansas City (Apr. 2008).
[13] *National Bancard Corp. (NaBANCO) v. Visa U.S.A., Inc.*, 779 F.2d 592 (11th Cir. 1986).
[14] *National Bancard Corp. (NaBANCO) v. Visa U.S.A., Inc.*, 596 F. Supp. 1231, 1263 (S. D. Fla., 1984).

1. Recent Visa and MasterCard IPOs Have Not Changed Their Role As the Collective Agent of Their Member Banks.

Traditionally, Visa and MasterCard were associations of their member banks. Thus, their setting of interchange fees to be collected by issuing banks directly constituted collective action by the associations' competing card issuers. Proponents of antitrust immunity argue that recent changes in ownership structure due to the Visa and MasterCard IPOs reflect changes merely in form, not substance. That is, rather than being associations of competing card issuers, the card systems now act as the agents of these competing banks in setting their identical interchange fees. The Sherman Act forbids a hub-and-spoke form of conspiracy in which a central agent manages a cartel even if the conspirators do not expressly agree with each other to go along with the hub's plan.[15] The antitrust violation is even clearer where there is an agreement among members along the "rim" to utilize the hub.[16]

This position finds support in the European Commission's 2007 decision holding that MasterCard's setting of interchange fees in Europe violates European competition law as collective action, notwithstanding its IPO. The Commission ordered MasterCard to terminate those interchange fees within six months, rejecting the argument that a change in corporate form somehow immunizes an electronic payment system from antitrust liability:

> MasterCard's viewpoint that the IPO . . . had changed the organization's governance so fundamentally that any decision of MasterCard Incorporated's Global Board no longer qualifies as a decision of an association [of its member banks] but rather as [a] "unilateral" act which each member bank bilaterally agrees to abide by, cannot be accepted.
>
> Contrary to MasterCard's argument, the aim of avoiding exposure to antitrust risks due to the MasterCard MIF [multilateral interchange fee] was a clear driving force behind the IPO. Rather than modifying the business model to bring it in line with EU competition law, the banks chose to change the governance of their co-ordination specifically for antitrust sensitive decision making. The member banks effectively *outsourced* this decision making to a new management body and made sure that their direct influence … would be limited to minority rights. However, the banks also agreed to the IPO … after MasterCard's management assured them that the banks' interests will continue to be preserved under a new "enhanced customer approach" and via the local input of the banks in the decision making.
>
> It cannot be doubted that in approving the IPO and thereby delegating the decision making powers for the MIF to the new independent Global Board, the

[15] *See, e.g., Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 932 (7th Cir. 2000).
[16] *See, e.g., Spectators' Commc'n Network, Inc. v. Colonial Country Club*, 253 F. 3d 215 (5th Cir. 2001).

member banks legitimately expected and therefore agreed that this Board would henceforth set the MIF in a manner that is in their common interest.[17]

2. Courts Have Held That Visa and MasterCard Possess Market Power.

Much has changed in the several decades since the *NaBANCO* decisions. In particular, multiple courts have held that Visa and MasterCard have market power in the payment card market. In 2001, the Justice Department successfully challenged Visa's and MasterCard's "so-called 'exclusionary' or 'exclusivity' rules, which prohibited members of their networks from issuing Amex and Discover cards."[18] In finding a Sherman Act violation, the court held that "whether considered jointly or separately, [Visa and MasterCard] have market power."[19] Specific evidence supporting this holding was that "Visa members accounted for approximately 47% of the dollar volume of credit and charge card transactions and MasterCard members for approximately 26%."[20] Combined, Visa and MasterCard together control over 73 percent of the volume of transactions on general purpose cards in the United States and approximately 85 percent of the cards issued.[21] In addition to these high market shares, Visa and MasterCard "have demonstrated their power in the network services market by effectively precluding their largest competitor from successfully soliciting any bank as a customer for its network services and brand."[22] Based upon these and other facts in the record – *e.g.*, that the market is highly concentrated and has high barriers to entry – the Second Circuit affirmed the trial court, ruling that Visa and MasterCard "jointly and separately, have power within the market for network services."[23]

Additionally, in a private case brought by merchants who also claimed that Visa and MasterCard engaged in anticompetitive conduct in violation of the antitrust laws by requiring merchants who accept Visa and MasterCard credit cards also to accept Visa and MasterCard debit cards, another court held that "Visa possesses appreciable economic power" in the credit card services market, finding that Visa's share of the credit card market alone was nearly 60 percent.[24] Given this market power, merchants cannot refuse to accept Visa and MasterCard cards as a practical matter. "[E]vidence establishes

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[17] European Commission Decision, COMP/34.579, at ¶¶ 357, 378-379 (Dec. 19, 2007) (footnotes omitted). MasterCard has appealed this decision to the European Union's Court of First Instance.

[18] *United States v. Visa U.S.A., Inc.*, 163 F. Supp. 2d 322, 338 (S.D.N.Y. 2001), *aff'd United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 240 (2d Cir. 2003).

[19] *Visa U.S.A., Inc.*, 163 F. Supp. 2d at 341. The court defined this market as the one in which networks like Visa and MasterCard "provide the infrastructure and mechanisms through which general purpose card transactions are conducted, including the authorization, settlement, and clearance of transactions." *Id*. at 338. The court also noted that "[m]erchant acceptance of a card brand is also defined and controlled at the system level and the merchant discount rate is established, directly or indirectly, by the networks." *Id*.

[20] *Id*. at 341.

[21] *Id*.

[22] *United States v. Visa U.S.A., Inc.*, 344 F.3d at 240.

[23] *Id*. at 239.

[24] *In re Visa Check/Mastermoney Antitrust Litigation*, No. 96-CV-5238 (JG), 2003 WL 1712568 at *3-*4 (E.D.N.Y. Apr. 1, 2003). Constantine Cannon, formerly Constantine & Partners, served as co-lead counsel in this litigation.

conclusively that merchants have not switched to other payment devices despite significant increases in the interchange fees on the defendants' credit cards."[25]

Moreover, card issuance has grown increasingly concentrated. MasterCard reportedly has about 20,000 member financial institutions, and Visa, 14,000 (many members issue both).[26] Nevertheless, in 2008 cards issued by the top 10 issuers of Visa and MasterCard branded credit cards comprised 81 percent of U.S. purchase volume.[27] Indeed, JP Morgan Chase, Bank of America, Citigroup, and Capital One credit cards accounted for about 65 percent of card purchase volume.[28] Not surprisingly, the card systems believe that they must be careful to respond to the needs of these banks. As MasterCard put it in its IPO filings, "We are, and will continue to be, significantly dependent on our relationships with our issuers and acquirers [member banks]…."[29] Thus, the card associations have a strong business incentive to satisfy the desires of their largest member banks in setting the interchange fee levels that each of them will collect from merchants when their cardholders use their cards.

3. There Are No Meaningful Merchant Negotiations Over Interchange Fee Levels.

Visa's and MasterCard's card-issuing banks rely on the card systems to serve as their agent in establishing interchange fees—identical to those charged by its card-issuing competitors—at levels that will satisfy their collective interest. Indeed, there is no evidence that issuing banks have negotiated with individual merchants regarding interchange fees levels. In turn, Visa and MasterCard have little incentive to bargain with individual merchants regarding such fee levels. Their market power and merchants' lack of a realistic choice of refusing to take "plastic" simply precludes anything other than one-sided fees and rules governing card acceptance.[30]

A GAO study confirms that even the U.S. Government has a limited ability to obtain interchange fee reductions through negotiations with the card systems. According to the GAO, the Treasury Department's Financial Management Service attempted to negotiate with both card systems, arguing that federal agency users "pose less risk than other merchant types and that there is no risk of delinquency on the part of the Treasury. FMS officials stated that their negotiations were not successful and that they were not able to negotiate lower interchange rates."[31] The Postal Service similarly met with

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[25] *Id*. at *3 ("there is no cross-elasticity of demand at the merchant level between the defendants' products and all other forms of payment").
[26] *See* H. Rept. No. 110-913 at 8-9.
[27] Calculation based on *The Nilson Report*, issues #918 (January 2009), #924 (May 2009).
[28] *Id.*
[29] MasterCard Incorporated, SEC Form S-1, Amendment No. 8, at 21 (May 23, 2006).
[30] There may be instances in which Visa or MasterCard—but not its members—may hold discussions with industry representatives regarding an industry-specific rate, e.g., for grocery stores, or in settlement of litigation.
[31] U.S. Government Accountability Office, *Federal Entities Are Taking Action to Limit Their Interchange Fees, but Additional Revenue Collection Cost Savings May Exist*, GAO-08-558, at 25 (May 2008).

limited success in its attempts to obtain lower interchange fees through negotiations with Visa and MasterCard.[32]

Not surprisingly, the merchant community views the current situation as unacceptable. Thus, many in the merchant community have supported an approach that: (1) attempted to balance card issuers' reliance on the card systems as a bargaining agent with their own ability to negotiate collectively; while (2) providing an incentive to the card systems to constructively negotiate with merchants by providing a dispute resolution mechanism should agreements not be reached.

III. Status of Legislation Granting Antitrust Immunity to Facilitate Bargaining Between Merchants and Card Systems

A. H.R. 5546, 110th Congress.

1. As Introduced.

In March 2008, Rep. John Conyers (D.-MI), Chairman of the House Judiciary Committee, and Rep. Chris Cannon (R.-UT) introduced H.R. 5546, the "Credit Card Fair Fee Act of 2008." Under the bill, merchants access to covered payment systems—those with a 20-percent or more market share[33] of credit and debit card transactions combined—would be through "access agreements" subject to negotiations under the Act. Antitrust immunity would be granted to a payment system and its members jointly to negotiate with merchants and "agree upon the rates and terms for access to the covered electronic payment system, including through the use of common agents that represent either providers of a single covered electronic payment system or merchants on a non-exclusive basis."[34] Immunity thus would be mutual: not only would merchants receive assurance that their collective negotiations would be free from potential antitrust challenge, but card systems' members similarly would receive assurances, prospectively, regarding their collective action to set card acceptance fees and rules.

If the parties are unable to reach an agreement, then each side would engage in final offer (i.e., "baseball-style") arbitration before a panel of three "Electronic Payment System Judges" who would administratively be located in the Federal Trade Commission ("FTC") or the Antitrust Division. This mechanism is similar to the dispute resolution mechanism in the case of statutory licenses for certain music performances (e.g., by satellite radio providers), which are heard by a three-judge Copyright Royalty Tribunal, administratively part of the Library of Congress.

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[32] *Id.*

[33] *Cf.* Federal Trade Commission and U.S. Department of Justice, *Antitrust Guidelines for Collaborations Among Competitors* at § 4.2 (Apr. 2000) (setting out a "safety zone" when "the market shares of the collaboration and its participants collectively account for no more than twenty percent of each relevant market in which competition may be affected"). The 20 percent limit with respect to combined credit and debit card transactions currently would include only Visa and MasterCard.

[34] H.R. 5546, 110th Cong. § 2(c) (2008).

The panel of Electronic Payment System Judges would have to choose, without modification, one of the final offers of each side. Based on evidence presented by the parties, they would choose the offer containing rates and terms that they concluded "most closely represent the rates and terms that would be negotiated in a hypothetical perfectly competitive marketplace for access to an electronic payment system between a willing buyer with no market power and a willing seller with no market power."[35] In performing this role, the judges would "consider the costs necessary to provide and access an electronic payment system for processing credit and/or debit card transactions as well as a normal rate of return in such a hypothetical perfectly competitive marketplace" and shall not allow "any anticompetitive rates or terms."[36] The approved agreement would be in effect for three years.

Even if a particular agreement were selected by the judges, merchants and card systems could enter into separate voluntary agreements. The terms of those agreements could be taken into consideration in the next round of negotiations as evidence of what market-based terms and conditions would look like. Thus, whether by voluntary agreement or through selection of the most appropriate best-and-final offer, access terms would have been determined by the parties, and not by government officials.

B. H.R. 5546, As Reported.

A hearing was held on May 15, 2008, and H.R. 5546 was marked-up and ordered reported in amended form on July 16, 2008 by the House Judiciary Committee on a vote of 19-16, composed of ten Democrats and nine Republicans in favor, and eight Democrats and eight Republicans in opposition.[37] No further action was taken.

The reported bill retained the provision of antitrust immunity for joint negotiations. However, it deleted the arbitration mechanism and the panel of Electronic Payment System Judges. In its stead was a provision intended to enlist the Antitrust Division in facilitation of voluntary agreements, primarily through the filing of cost information regarding the processing and use of payment card transactions by the 10 largest issuers and acquiring banks of each payment system, as well as by the payment system processor. The 10 largest merchants (in terms of transactions with a payment system) must also make cost disclosures. The Antitrust Division would report to the House and Senate Judiciary Committees on the process of negotiations, and the nature of any agreements reached. Additionally, any agreement reached pursuant to a grant of immunity must contain provisions requiring merchants to pass on reductions in access costs to customers and employees, and requiring financial institutions to pass on any increases in revenues to their customers and employees.

In addition, both the Antitrust Division and the FTC advised the Committee that they had concerns with administrative complexities associated with the three-judge panel.

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[35] *Id*. at § 2(d).
[36] *Id*.
[37] *See* H. Rept. No. 110-93, at 19 (Individual views of Reps. Lamar Smith (R-TX), Bob Goodlatte (R.-VA), and Darrell Issa (R.-CA).

The Antitrust Division further expressed concern with the concept of use of an antitrust exemption to counterbalance the perceived market power of the card systems and their member banks, and noted that the outcome of the negotiations could injure cardholders through a decrease in award miles and other card benefits.[38] The FTC, while noting that antitrust exemptions are disfavored, did not argue that the burden had not been met. Rather, the FTC's comments stated that "a governmental process for setting private transactions is at odds with the Commission's mission … in promoting open market competition."[39] The Committee's action in removing the arbitration panel and requiring any agreements to "pass-through" cost savings or added revenues were an attempt to respond to such concerns. In addition, responding to testimony from small banks and credit unions, such institutions were permitted individually to opt out of any negotiated agreements.

B. Developments in the 111th Congress.

On June 9, 2009, Sen. Richard Durbin (D.-IL) introduced S. 1212, the "Credit Card Fair Fee Act of 2009." The bill is largely identical to H.R. 5546 of the 110th Congress, as originally introduced. Major differences are that "covered electronic payment system" is defined to include systems with a market share of not less than 10 percent, rather than 20 percent, of combined credit and debit card transactions, and the factors to be considered by the Electronic Payment System Judges are clarified.

On June 4, 2009, House Judiciary Chairman Conyers introduced H.R. 2695, also titled the "Credit Card Fair Fee Act of 2009." The bill is essentially identical to H.R. 5546 of the 110th Congress, as reported. Neither S. 1212 nor H.R. 2695 has been the subject of further legislative action following introduction.

Taking a different approach, on May 13, 2009, Rep. Peter Welch (D.-VT) introduced H.R. 2382, the "Credit Card Interchange Fees Act of 2009," which attempts to affect fee levels by adding a new chapter to the Truth in Lending Act. The new provisions outlaw specific payment system rules that restrain merchants' ability to control their acceptance of specific card products and/or to control their marketing practices. Forbidden rules include those that prevent merchants from refusing to accept individual card products based on differences in their associated interchange fee levels, and those that restrict the ability of merchants to "steer" consumers to the merchants' preferred form of payment or limit their ability to advertise or display a merchant's prices. The bill further prohibits transaction fees associated with a consumer's use of a "premium" payment card from exceeding the amount associated with use of a non-premium card.

H.R. 2382 would also give the FTC the power to prohibit card system rules or practices that are unfair or deceptive to consumers and merchants or are anticompetitive. The bill was the subject of a hearing before the Financial Services Committee, but there has been no further legislative action.

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[38] *See id.* at 24-25.
[39] As quoted in *id*. at 25.

IV. Concluding Observations

There is generally agreement (except by the financial services industry) that the Visa and MasterCard interchange fee system is broken. Dominant firms have collectively taken action: (1) to restrict merchants' ability to make card acceptance costs transparent to consumers when those consumers chose their method of payment; (2) to use this failure of pricing transparency to incentivize consumers to use methods of payment that impose the highest interchange fee costs on merchants (e.g., premium rewards cards); and (3) to use the card systems as the issuing banks' agents in setting interchange fees at levels that maximize revenues to those competing card issuers.

Nevertheless, antitrust and banking authorities in the United States—in contrast to those in many of our major trading partners—have taken no enforcement actions regarding issuing banks' use of the payment systems as their agents in setting interchange fee levels. Nor have they acted to block card system rules that limit merchants' ability to accept payment cards based on their relative fee levels or use differential pricing and advertising practices regarding different payment cards.

And while courts are effective at remedying past conduct that violates the antitrust laws, Congress is well-suited to prevent *future* anticompetitive conduct in a complex industry such as electronic payment systems. In large part, this is because there are only a limited number of injunctive relief options available to courts to affect on-going conduct. The experience of the AT&T divestiture decree, in which a federal district judge ruled on the fundamental details of the telephone industry for over a decade, is surely a cautionary one for Congress as it ponders whether or not to move forward with legislation to address interchange fees and rules.