Assistant Attorney General, Environment and Natural Resources Division, and either e-mailed to *pubcomment-ees.enrd@usdoj.gov* or mailed to P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *In re Chemtura Corp., et al.,* D.J. Ref. 90–11–3–09736. Commenters may request an opportunity for a public meeting in the affected area, in accordance with Section 7003(d) of the Resource Conservation and Recovery Act, 42 U.S.C. 6973(d).

The Settlement Agreement may be examined at the Office of the United States Attorney, 86 Chambers Street, 3rd Floor, New York, New York 10007, and at the U.S. Environmental Protection Agency, Ariel Rios Building, 1200 Pennsylvania Avenue, NW., Washington, DC 20460. During the public comment period, the Settlement Agreement may also be examined on the following Department of Justice Web site, *http://www.usdoj.gov/enrd/Consent_Decrees.html.* Copies of the Settlement Agreement may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611 or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of $5.25 (25 cents per page reproduction cost) payable to the U.S. Treasury or, if by e-mail or fax, please forward a check in that amount to the Consent Decree Library at the stated address.

Maureen Katz,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2010–25690 Filed 10–12–10; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Under Sections 107(A) and 113(G)(2) of The Comprehensive Environmental Response, Compensation, and Liability Act of 1980

Notice is hereby given that on October 5, 2010, a Complaint was filed and a proposed Consent Decree was lodged in the United States District Court for the District of Utah in a matter captioned *United States* v. *Mueller Industries, Inc.,* Civil Action No. 2:10–cv–00981–BCW.

The Complaint is a civil action brought jointly by the United States and the State against Mueller Industries, Inc. ("Mueller") under Sections 107(a) and 113(g)(2) of the CERCLA, 42 U.S.C. 9607(a) and 9613(g)(2). The Complaint seeks the recovery of costs incurred and to be incurred by the United States and the State in response to releases or threatened releases of hazardous substances at the Eureka Mills Superfund Site ("Site") in Eureka, Utah., which the United States and the State of Utah allege are attributable to the activities of Mueller and its predecessors. The proposed Consent Decree resolves all allegations asserted in the Complaint and provides for a payment of $ 2,250,000 to the United States and $250,000 to the State of Utah. In exchange, Mueller receives from the United States and the State a covenant not to sue for past and future response costs for the Site and a covenant not to sue for certain property immediately adjacent to the Site, but only to the extent that releases from the adjacent property contribute to response costs incurred on-Site.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the settlement. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and either e-mailed to *pubcomment-ees.enrd@usdoj.gov* or mailed to P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *United States* v. *Mueller Industries, Inc.,* Civil Action No. 2:10–cv–00981–BCW, Ref. 90–11–3–07993/5.

The Consent Decree may be examined at the United States Attorneys Office for the District of Utah, 185 South State Street, Suite 300, Salt Lake City, Utah 84111 (USAO No. 2010v00238) and at U.S. EPA Region 8, 1595 Wynkoop Street, Denver, CO 80202–1129. During the public comment period, the Consent Decree, may also be examined on the following Department of Justice Web site, follows *http://www.usdoj.gov/enrd/Consent_Decrees.html.* A copy of the Consent Decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611 or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy, exclusive of exhibits, from the Consent Decree Library, please enclose a check in the amount of $6.00 (25 cents per page reproduction cost) payable to the U.S. Treasury or, if by e-mail or fax, forward a check in that amount to the Consent Decree Library at the stated address. If requesting a copy including all exhibits, please enclose a check in the amount of $6.50 payable to the U.S. Treasury.

Maureen Katz,

Assistant Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2010–25670 Filed 10–12–10; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Antitrust Division

United States, et al. v. *American Express Company, et al.;* Proposed Final Judgment and Competitive Impact Statement

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h), that a proposed Final Judgment, Stipulation, and Competitive Impact Statement have been filed with the United States District Court for the Eastern District of New York in *United States of America, et al.* v. *American Express Company, et al.,* Civil Action No. CV–10–4496. On October 4, 2010, the United States and seven States filed a Complaint alleging that certain rules, policies, and practices of Defendants American Express Company, American Express Travel Related Services Company, Inc., MasterCard International Incorporated, and Visa Inc. violate Section 1 of the Sherman Act, 15 U.S.C. 1. Those rules, policies, and practices obstruct merchants from offering discounts, other benefits, and information to customers who use the merchants' preferred form of payment. The proposed Final Judgment, filed on the same day as the Complaint, resolves the case with respect to Defendants MasterCard and Visa by prohibiting them from maintaining the rules, policies, and practices challenged in the Complaint.

Copies of the Complaint, proposed Final Judgment, and Competitive Impact Statement are available for inspection at the Department of Justice, Antitrust Division, Antitrust Documents Group, 450 Fifth Street, NW., Suite 1010, Washington, DC 20530 (*telephone:* 202–514–2481), on the Department of Justice's Web site at *http://www.usdoj.gov/atr,* and at the Office of the Clerk of the United States District Court for the Eastern District of New York. Copies of these materials may be obtained from the Antitrust Division upon request and payment of the copying fee set by Department of Justice regulations.

Public comment is invited within 60 days of the date of this notice. Such

comments, and responses thereto, will be filed with the Court and may be published in the **Federal Register**, in accordance with the Antitrust Procedures and Penalties Act. Comments should be directed to John Read, Chief, Litigation III, Antitrust Division, Department of Justice, Washington, DC 20530, (*telephone:* 202–307–0468).

Robert Kramer,

Director of Operations.

In The United States District Court for the Eastern District of New York

United States of America, State of Connecticut, State of Iowa, State of Maryland, State of Michigan, State of Missouri, State of Ohio, and State of Texas Plaintiffs, v. *American Express Company, American Express Travel Related Services Company, Inc., Mastercard International Incorporated, and Visa Inc. Defendants.*

Civil Action No. CV–10–4496

(Garaufis, J.)
(Pollak, M.J.)

Complaint for Equitable Relief for Violation of Section 1 of the Sherman Act, 15 U.S.C. 1

The United States of America, by its attorneys acting under the direction of the Attorney General; the State of Connecticut, by its Attorney General Richard Blumenthal; the State of Iowa, by its Attorney General Thomas J. Miller; the State of Maryland, by its Attorney General Douglas F. Gansler; the State of Michigan, by its Attorney General Michael A. Cox; the State of Missouri, by its Attorney General Chris Koster; the State of Ohio, by its Attorney General Richard Cordray; and the State of Texas, by its Attorney General Greg Abbott (collectively, "Plaintiffs"), bring this civil antitrust action against Defendants American Express Company and American Express Travel Related Services Company, Inc. (collectively, "American Express"), MasterCard International Incorporated ("MasterCard"), and Visa Inc. ("Visa") (collectively, "Defendants") to obtain equitable relief to prevent and remedy violations of Section 1 of the Sherman Act, 15 U.S.C. 1.

Plaintiffs allege:

I. Introduction

1. Defendants operate the three largest credit and charge card transaction networks in the United States. In 2009, a substantial amount of interstate commerce—over $1.6 trillion in transaction volume—flowed through Defendants' networks. Every time a consumer uses one of Defendants' credit or charge cards to pay for a purchase from a merchant, the merchant must pay a fee, often called a "card acceptance fee," "merchant discount fee," or "swipe fee." In 2009 alone, Defendants and their affiliated banks collected more than $35 billion in such fees from U.S. merchants. Defendants' fees are a significant cost for merchants that accept Defendants' cards, and merchants pass these costs on to all consumers through higher retail prices.

2. Plaintiffs bring this action to prevent Defendants from imposing on merchants certain rules, policies, and practices ("Merchant Restraints") that insulate Defendants from competition. The Merchant Restraints impede merchants from promoting or encouraging the use of a competing credit or charge card with lower card acceptance fees. Each Defendant's vertical Merchant Restraints are directly aimed at restraining horizontal interbrand competition.

3. Each Defendant has suppressed competition with rival networks at the "point of sale," where merchants interact directly with customers, by disrupting the ordinary give and take of the marketplace. Most consumers who use credit or charge cards carry more than one. Defendants' Merchant Restraints, however, prevent merchants from offering their customers a discount or benefit for using a network credit card that is less costly to the merchant. Merchants cannot reward their customers based on the customer's card choice. Merchants cannot even suggest that their customers use a less costly alternative card by posting a sign stating "we prefer" another card or by disclosing a card's acceptance fee. In short, Defendants' Merchant Restraints prohibit merchants from fostering competition among credit card networks at the point of sale.

4. By incorporating and enforcing its Merchant Restraints in agreements with merchants, each Defendant has violated and continues to violate Section 1 of the Sherman Act, 15 U.S.C. 1.

II. Defendants

5. Defendant American Express Company is a New York corporation with its principal place of business in New York, New York. Defendant American Express Travel Related Services Company, Inc., a wholly owned subsidiary of American Express Company, is a Delaware corporation, with its principal place of business in New York, New York. It is the principal operating subsidiary of American Express Company. In 2009, cardholders used American Express credit and charge cards for purchases totaling $419.8 billion.

6. Defendant MasterCard is a Delaware corporation with its principal place of business in Purchase, New York. In 2009, cardholders used MasterCard credit and charge cards for purchases totaling $476.9 billion.

7. Defendant Visa is a Delaware corporation with its principal place of business in San Francisco, California. Visa has offices, transacts business, and is found in New York. In 2009, cardholders used Visa credit and charge cards for purchases totaling $764.2 billion.

III. Jurisdiction and Venue

8. Plaintiff United States of America brings this action pursuant to Section 4 of the Sherman Act, as amended, 15 U.S.C. 4, to obtain equitable and other relief to prevent and restrain violations of Section 1 of the Sherman Act, 15 U.S.C. 1. Plaintiffs Connecticut, Iowa, Maryland, Michigan, Missouri, Ohio, and Texas, by and through their respective Attorneys General, bring this action in their respective sovereign capacities and as parens patriae on behalf of the citizens, general welfare, and economy of their respective States under their statutory, equitable and/or common law powers, and pursuant to Section 16 of the Clayton Act, 15 U.S.C. 26, to prevent Defendants from violating Section 1 of the Sherman Act.

9. This Court has subject-matter jurisdiction over this action under Section 4 of the Sherman Act, 15 U.S.C. 4.

10. This Court has personal jurisdiction over each Defendant and venue is proper in this District under 15 U.S.C. 22 because each Defendant transacts business and/or is found within this District. Defendants' credit and charge cards are and have been used for billions of dollars of purchases in this District.

IV. Trade and Commerce

11. Defendants operate credit and charge card networks in the United States, and sell products and services in the flow of interstate commerce. Defendants' products and services involve a substantial amount of interstate commerce. In 2009, credit and charge card transaction volume on Defendants' networks in the United States exceeded $1.6 trillion.

V. Industry Background

12. General purpose credit and charge cards ("General Purpose Cards") are payment devices that a consumer can use to make purchases from a wide variety of merchants without accessing

or reserving the consumer's funds at the time of the purchase. There are two principal types of General Purpose Cards:

a. Credit cards, which usually permit the cardholder to pay either (i) all charges within a set period after a monthly bill is rendered, or (ii) only a portion of the charges within that time and pay the remainder in monthly installments, including interest; and

b. charge cards, which require the cardholder to pay all charges within a set period after a monthly bill is rendered.

13. General Purpose Cards include cards for personal use (issued to individuals for their personal use), cards for small business (issued to individuals for use with a small business), and commercial and corporate cards (issued to individuals, organizations, and businesses for business use).

14. General Purpose Cards do not include cards that can be used at only one merchant (such as department store cards) or cards that access funds on deposit in a checking or savings account or on the card itself (such as signature debit cards, PIN debit cards, prepaid cards, or gift cards).

15. In Visa and MasterCard transactions, the "card acceptance fee" or "merchant discount fee" that a merchant pays has three principal components: the interchange fee, the assessment fee, and the acquiring fee. To comply with the Visa and MasterCard rules, the merchant's bank (called the "acquiring bank"), which manages the merchant's relationship with Visa and MasterCard, must withhold the full card acceptance fee from the amount it pays the merchant for each transaction, meaning the merchant receives less than the retail price it charges to the consumer.

16. The largest component of the card acceptance fee is the interchange fee, which is received by the Visa or MasterCard "issuing bank" (or "issuer") that issues the card used by the customer. The interchange fee typically is set as a percentage of the underlying transaction price. Visa and MasterCard set interchange fees and have raised them significantly over time.

17. Visa and MasterCard themselves keep a part of the fee paid by merchants (the "assessment fee").

18. Finally, the acquiring bank keeps one component of the card acceptance fee, the acquiring fee, for its services.

19. American Express issues most of its General Purpose Cards to cardholders directly, combining issuer and network functions with respect to those General Purpose Cards. American Express generally provides network services directly to merchants as well. Some American Express cards are issued through agreements with issuing banks, in which case American Express operates only as a network. For all purposes relevant to this Complaint, such bank-issued cards function substantially the same as those issued by American Express directly, and American Express imposes the same Merchant Restraints for acceptance of its bank-issued cards.

20. Like the Visa and MasterCard networks, American Express' network imposes a fee on the merchant for each transaction. Like Visa and MasterCard, American Express' card acceptance fee typically is set as a percentage of the transaction price. For example, American Express imposes a card acceptance fee of 3% for some transactions. In such transactions, merchants would receive $97 on a $100 retail transaction. American Express would extract the remaining $3 from the transaction. The cost borne by merchants for customers' use of American Express General Purpose Cards is often substantially higher than the cost of customers' use of competing networks' General Purpose Cards. Any other General Purpose Card selected by the customer from the options in his or her wallet—such as a Discover, MasterCard, or Visa General Purpose Card—generally would be less costly to the merchant.

21. Merchants charge higher retail prices to customers to cover the cost of paying these fees to Defendants.

VI. Restraints on Competition

22. Each Defendant has instituted its own set of Merchant Restraints prohibiting or restricting a merchant that accepts that Defendant's General Purpose Card from encouraging its customers to use any other network's card at the point of sale. Defendants' Merchant Restraints impose a competitive straightjacket on merchants, restricting decisions by them to offer discounts, benefits, and choices to customers that many merchants would otherwise be free to offer.

23. Each Defendant applies its Merchant Restraints through agreements with merchants or with merchants' acquiring banks. Each Defendant's set of vertically imposed restrictions independently restrains competition among networks. Each Defendant's Merchant Restraints violate Section 1 of the Sherman Act apart from the existence of the other two Defendants' Merchant Restraints.

24. Visa and MasterCard include their Merchant Restraints in contracts with acquiring banks. Through these contracts, Visa and MasterCard require acquiring banks to obtain agreement from merchants to abide by Visa's and MasterCard's rules, including the Merchant Restraints. Visa and MasterCard require their acquiring banks to penalize merchants that do not adhere to the Merchant Restraints. American Express includes its Merchant Restraints in its contracts with merchants that accept its cards. In circumstances where American Express contracts with the merchant's acquiring bank, American Express requires the acquiring bank to ensure the merchant complies with the Merchant Restraints.

25. Merchants must accept the Merchant Restraints in order to accept Defendants' cards. Merchants clearly understand and expressly agree that they must comply with the Merchant Restraints. Defendants actively monitor and vigorously enforce the Merchant Restraints.

26. Visa's Merchant Restraints prohibit a merchant from offering a discount at the point of sale to a consumer who chooses to use an American Express, Discover, or MasterCard General Purpose Card instead of a Visa General Purpose Card. Visa's rules do not allow discounts for other payment cards that generally require a signature at the point of sale, unless such discounts are equally available for Visa transactions. Visa International Operating Regulations at 445 (April 1, 2010) (Discount Offer—U.S. Region 5.2.D.2).

27. Similarly, MasterCard's Merchant Restraints prohibit a merchant from "engag[ing] in any acceptance practice that discriminates against or discourages the use of a [MasterCard] Card in favor of any other acceptance brand." MasterCard Rule 5.11.1 (May 12, 2010). This means that merchants cannot offer a discount, or any other benefit, to persuade consumers to use an American Express, Discover, or Visa General Purpose Card instead of a MasterCard General Purpose Card. *Id.* MasterCard does not allow merchants to favor competing card brands. *Id.*

28. American Express' point-of-sale rules on merchants restrict competition more than the rules of its rival networks. American Express' Merchant Restraints are described in its "Merchant Reference Guide–US" (April 2010), Section 3.2. The language in Section 3.2 is inserted in identical or substantially similar form in most of American Express' contracts with merchants. In many agreements, the Guide is expressly incorporated by reference. The Merchant Restraints described in Section 3.2 impose the following restrictions on merchants that accept American Express:

Merchants must not:
—indicate or imply that they prefer, directly or indirectly, any Other Payment Products over [American Express'] Card,
—try to dissuade Cardmembers from using the Card,
—criticize * * * the Card or any of [American Express'] services or programs,
—try to persuade or prompt Cardmembers to use any Other Payment Products or any other method of payment (*e.g.,* payment by check),
—impose any restrictions, conditions, [or] disadvantages * * * when the Card is accepted that are not imposed equally on all Other Payment Products, except for ACH funds transfer, cash, and checks, * * * or
—promote any Other Payment Products (except the Merchant's own private label card that they issue for use solely at their Establishments) more actively than the Merchant promotes [American Express'] Card.

Merchants may offer discounts from their regular prices for payments in cash or by ACH funds transfer or check, provided that they clearly disclose the terms of the offer (including the regular and discounted prices) to customers and that any discount offered applies equally to Cardmembers and holders of Other Payment Products.

Whenever payment methods are communicated to customers, or when customers ask what payments are accepted, the Merchant must indicate their acceptance of the Card and display [American Express'] Marks according to [American Express'] guidelines and as prominently and in the same manner as any Other Payment Products.

29. The American Express Merchant Reference Guide–US defines the term "Other Payment Products" used in Section 3.2 as "[a]ny charge, credit, debit, stored value or smart cards, account access devices, or other payment cards, services, or products other than the [American Express] Card."

30. Defendants' rules and practices described in paragraphs 26–29 constitute the Merchant Restraints challenged in this action because and to the extent that they deter or obstruct merchants from freely promoting interbrand competition by offering customers discounts, other benefits, or information to encourage the customer to use a General Purpose Card or payment method other than that Defendant's General Purpose Card.

31. Defendants' Merchant Restraints thus forbid, among other things, the following types of actions a merchant could otherwise use at the point of sale to foster competition on price and terms among sellers of network services:
—promoting a less expensive General Purpose Card brand more actively than any other General Purpose Card brand;
—offering customers a discount or benefit for use of a General Purpose Card brand that costs less to the merchant;
—asking customers at the point of sale if they would consider using another General Purpose Card brand in their wallets;
—posting a sign encouraging use of, or expressing preference for, a General Purpose Card brand that is less expensive for the merchant;
—posting the signs or logos of General Purpose Card brands that cost less to the merchant more prominently than signs or logos of more costly General Purpose Card brands; or
—posting truthful information comparing the relative costs of different General Purpose Card brands.

32. Federal law mandates that networks permit merchants to offer discounts for cash transactions. Additionally, the new Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, by adding section 920 to the Electronic Fund Transfer Act, 15 U.S.C. 1693 *et seq.,* now forbids networks from prohibiting merchants from offering a discount for an entire payment method category, such as a discount for use of any debit card. All General Purpose Card networks operate under these laws. This Complaint does not seek relief relating to these two types of discounting.

VII. Relevant Markets

A. Product Markets

33. Defendants participate in two distinct product markets in the United States relevant to this Complaint: the General Purpose Card network services market, and the General Purpose Card network services market for merchants in travel and entertainment ("T&E") businesses.

1. General Purpose Card Network Services

34. General Purpose Card network services involve the processing of General Purpose Card transactions across a network. General Purpose Card networks provide infrastructure and mechanisms enabling merchants to obtain authorization for, settle, and clear transactions for their customers who pay with General Purpose Cards. Merchant acceptance of General Purpose Cards is defined and controlled at the network level, and prices to merchants are established directly or indirectly by the networks. A relevant product market for this case is the provision of General Purpose Card network services to merchants.

35. American Express, Discover, MasterCard, and Visa compete as sellers of these network services to merchants in the United States.

36. Visa and MasterCard provide network services indirectly to merchants through the merchants' acquiring banks. American Express generally sells its network services directly to merchants.

37. Merchants accept General Purpose Cards because many consumers strongly prefer to use General Purpose Cards over other means of payment. Millions of consumers prefer General Purpose Cards because they provide a combination of convenience, widespread acceptance, security, and deferred payment options that are not effectively replicated by other payment methods.

38. Each Defendant provides network services only for the use of its own General Purpose Cards, not for any other network's General Purpose Cards. Merchants that accept General Purpose Cards must purchase network services. Merchants cannot reasonably replace General Purpose Card network services with other services or reduce usage of these network services, even if such network services are substantially more expensive for merchants relative to services that enable other payment methods. Even a large increase in network fees would not provide a meaningful financial incentive for merchants to abandon acceptance of General Purpose Cards. Although other services that enable payment exist outside this relevant market, none of these services is a reasonable substitute for General Purpose Card network services from the perspective of merchants.

39. Competition from other payment methods in the geographic market identified below would not be sufficient to prevent a hypothetical monopolist of General Purpose Card network services from profitably maintaining supracompetitive prices and terms for network services provided to merchants over a sustained period of time. Nor would competition from other payment methods prevent a hypothetical monopolist in the General Purpose Card network services market from imposing anticompetitive conditions on merchants in that market.

40. In addition to selling General Purpose Card network services to merchants, Defendants provide separate network services to a different group of customers: issuers, which provide General Purpose Cards to cardholders. Questions of market power and harm are distinct for the two separate customer groups. Sellers of General Purpose Card network services to merchants could exercise market power over merchants even in circumstances in which they could not exercise market power over issuers. Any benefits received by issuers are not necessarily shared with merchants, and would not offset anticompetitive harm imposed by networks on merchants.

2. Travel and Entertainment Market

41. Within the relevant market of General Purpose Card network services, there is another relevant market—a price discrimination market—consisting of General Purpose Card network services provided to merchants in travel and entertainment businesses. Specifically, merchants selling goods and services to customers primarily for travel and entertainment (for example, air travel, lodging, and rental cars) are exposed to price discrimination.

42. Price discrimination occurs when a seller charges different customers (or groups of customers) different prices for the same services, when those different prices are not based on different costs of serving those customers. General Purpose Card networks set fees for network services to some merchants separately from fees to other merchants. Setting a lower fee for one group has little to no effect on a network's ability to set a higher fee for other groups.

43. Competition from other payment methods in the geographic market identified below would not be sufficient to prevent a hypothetical monopolist in the market for General Purpose Card network services for T&E merchants from either profitably maintaining supracompetitive prices and terms for network services to T&E merchants over a sustained period of time or imposing anticompetitive conditions on T&E merchants in that market. A hypothetical monopolist could price discriminate profitably against T&E merchants even if other merchants were paying lower prices for network services.

44. Each Defendant can identify whether a merchant participates in the T&E sector, and establishes merchant pricing by segment or category. Each Defendant, for example, has one set of prices for airline merchants and a different set of prices for supermarket merchants. American Express has separate price schedules for Airlines, Lodging, Car Rentals, and Travel Agents. American Express has an agreement with each merchant customer, and each agreement contains the price American Express charges that merchant. Visa and MasterCard can and do identify T&E merchants through their relationships with the merchants' acquiring banks.

45. Defendants charge merchants in the T&E sector higher fees than they charge most other merchants. Moreover, American Express charges T&E merchants higher fees than competing networks charge T&E merchants. The high fees to T&E merchants are not based on Defendants' higher costs of serving their T&E merchants. Each Defendant can charge T&E merchants high fees because those merchants are even less able to substitute away to other networks than other merchants. For example, American Express imposed a substantial fee increase on major airline merchants in 2008 without losing any major airline merchant customers, even though its fees already were higher than those of other General Purpose Card networks. A substantial differential in card acceptance fees exists between General Purpose Card network services for merchants in T&E businesses and merchants in other businesses.

46. Each Defendant's price discrimination against T&E merchants is persistent and systematic. American Express, for example, has successfully maintained higher profit margins for T&E customers than for other merchant categories.

47. Arbitrage, or indirect purchasing by T&E merchants of Defendants' network services from other merchants to avoid price discrimination, is impossible. For example, merchants can buy network services for transactions using American Express General Purpose Cards only from American Express, and one merchant cannot resell American Express network services to another merchant. T&E merchants have no realistic ability to avoid Defendants' high fees.

48. T&E merchants constitute a distinct customer group that cannot easily substitute away from the card network their customers want to use for travel and entertainment purchases. T&E merchants (such as airline, hotel, and rental car merchants) depend on business travelers as a significant source of revenues. Business travelers often are required or encouraged by their employers to use corporate cards of a particular network to qualify for reimbursement from their employers. Customers typically make larger purchases from T&E merchants than from merchants in many other industries. They also often purchase from T&E merchants through the Internet. T&E merchants thus rely more on General Purpose Cards than many other merchants and are even less willing and able than other merchants to substitute from General Purpose Cards to alternative payment methods in response to high network prices. In short, T&E merchants have particularly high inelasticity of demand for General Purpose Card network services.

49. Network industry participants recognize T&E merchants as a distinct market for network services. For many years, for example, American Express has had a T&E Industries Business Unit. Indeed, the principal operating subsidiary of American Express Company is the American Express Travel Related Services Company, Inc.

50. Accordingly, a distinct, additional relevant market exists for General Purpose Card network services to T&E merchants.

B. Geographic Market

51. The United States is the relevant geographic market for both the sale of General Purpose Card network services to all merchants and the sale of such services to T&E merchants.

52. Each Defendant treats the United States as a separate geographic market, as demonstrated in part by each Defendant's separate rules governing merchant acceptance in the United States and its separate pricing of network services to merchants in the United States. Defendants can easily identify the location of a merchant outlet. Arbitrage, or indirect purchasing by U.S. merchants of Defendants' network services from merchants located outside of the United States, is impossible.

53. The vast majority of General Purpose Card transactions with merchants located in the United States are made using General Purpose Cards issued in the United States. Almost all General Purpose Cards issued in the United States are issued under the American Express, Discover, MasterCard, and Visa networks. Other networks have limited competitive significance for U.S. merchants, as reflected in their negligible share of sales to U.S. merchants.

54. A hypothetical monopolist of General Purpose Card network services or General Purpose Card network services to T&E merchants could profitably maintain supracompetitive prices for network services provided to merchants in the United States over a sustained period of time and could

impose anticompetitive conditions on merchants in the United States even if merchants located outside the United States paid competitive prices for network services.

VIII. Market Power

55. Visa, MasterCard, and American Express each possess market power in the General Purpose Card network services market. The Second Circuit previously held that MasterCard and Visa each has market power in a General Purpose Card network services market. *U.S.* v. *Visa U.S.A., Inc.,* 344 F.3d 229, 238–39 (2d Cir. 2003). American Express also possesses market power in the General Purpose Card network services market.

56. Merchant acceptance of Defendants' General Purpose Cards is widespread. Merchants accounting for a substantial amount of General Purpose Card purchase volume in the United States accept all three Defendants' General Purpose Cards.

57. Merchants choose payment networks to accommodate the preferred payment brands of their customers. Some customers strongly prefer a particular brand and in some cases carry only one General Purpose Card brand. For example, in August 2009, 16% of American Express cardholders used only American Express and no other major General Purpose Cards. Such high cardholder insistence on using American Express gives American Express market power over merchants.

58. Merchants also consider whether their competitors accept a network's General Purpose Card and, if so, feel additional pressure to accept that network's card. Indeed, many merchants must accept all Defendants' General Purpose Cards to remain competitive with other merchants.

59. Despite technological advances that have decreased costs associated with General Purpose Card transactions over recent decades, Visa and MasterCard have increased the fees they charge merchants without losing sufficient merchants to make the price increases unprofitable.

60. American Express has for many years maintained the highest card acceptance fees among networks, including Visa and MasterCard. In recent years, American Express has increasingly been able to resist merchant pressure to reduce its card acceptance fees. American Express CEO Ken Chenault explained in 2009:

> At a time when many companies have had to cut or discount their prices and fees, we've been able to hold our own * * *. We're not lowering prices to get or keep customers or merchants. We continue to sign new merchants at existing discount rate levels * * *. This is significantly different from the position we were in during the downturn of the early 1990's. At that time our card and merchant pricing was under enormous pressure, and we did have to reduce fees.

American Express has increased the fees it charges many merchants without losing sufficient merchants to make the price increases unprofitable.

61. Notwithstanding these high fees, merchants continue to accept Defendants' General Purpose Cards because they would face serious economic consequences if they ceased to accept any one of the three Defendants' General Purpose Cards. Unlike customers in most markets for goods and services, merchants cannot buy fewer services from one Defendant's network and buy more services from a competing network at the point of sale, even in the face of higher fees imposed by that network or lower fees offered by competing networks. A merchant's efforts to reduce its purchases of one network's services by encouraging its customers to choose another network's General Purpose Card would violate Defendants' Merchant Restraints. Thus, a merchant may resist a Defendant's high card acceptance fees only by no longer accepting that Defendant's cards. This all-or-nothing choice severely constrains merchants, because dropping any one of the Defendants' General Purpose Cards could alienate customers and lead to significant lost sales. The Merchant Restraints leave merchants less able to avoid Defendants' supracompetitive prices than they otherwise would be.

62. Defendants' ability to discriminate in the prices they charge different types of merchants, unexplained by cost differences, also reflects their market power. For example, American Express targets specific merchant segments for differential pricing based on those merchants' ability to pay and their inability to refuse to accept American Express, a practice American Express calls "value recapture." American Express generally charges higher fees to merchants that rely more on General Purpose Cards for their business, such as T&E merchants, than it charges merchants that traditionally rely less on American Express.

63. This direct evidence of Defendants' market power is consistent with their market share of General Purpose Card transaction volume. American Express, MasterCard, and Visa each has significant market shares in the highly concentrated General Purpose Card network services market. In 2009, the three Defendants together had approximately 94% of the dollar volume of U.S. issued General Purpose Cards. According to Nilson data, Visa's share was approximately 43%, while MasterCard had a 27% share, and American Express had a 24% share. Each of these market shares is consistent with market power in a market with high concentration and other particular characteristics of the General Purpose Cards network services market. For example, the Second Circuit held that MasterCard had market power with a market share of 26%. *U.S.* v. *Visa U.S.A., Inc.,* 344 F.3d at 239–40. In subsequent litigation, American Express itself alleged that MasterCard "exercised market power in the network services market" when MasterCard's "share was approximately 26%," quite similar to American Express' share in the market for General Purpose Card network services to merchants today.

64. Defendants' acceptance among merchants is widespread. Visa and MasterCard are accepted at over 8.2 million merchant locations in the U.S. In 2009, American Express was accepted at 4.9 million merchant locations in the U.S., or about 60% as many as accept Visa and MasterCard. In recent years, American Express has expanded its acceptance at many "everyday spend" merchants, adding, for example, McDonalds (2004), Safeway (2004), Food Lion (2007) and Dollar Tree (2010). Today, many of the merchants that do not accept American Express are small and do not account for significant transaction volume. Indeed, American Express has stated that "as of the end of 2009, our merchant network in the United States accommodated more than 90% of our Cardmembers' general-purpose charge and credit card spending."

65. Among large U.S. retailers that account for a substantial amount of U.S. transaction volume, acceptance of all three Defendants' General Purpose Cards is widespread. For example, 95 of the largest 100 U.S. retailers accept all Defendants' General Purpose Cards. And in many major merchant segments, Defendants' acceptance is nearly universal. All major airlines, for instance, accept all three Defendants' General Purpose Cards.

66. Significant barriers to entry and expansion protect Defendants' market power, and have contributed to Defendants' ability to maintain high prices for years without threat of price competition by new entry or expansion in the market. These barriers to entry and expansion include the prohibitive cost of establishing a physical network over which General Purpose Card transactions can run, developing a widely recognized brand, and

establishing a base of merchants and a base of cardholders. Defendants, who achieved these necessities early in the history of the industry, obtained substantial early mover advantages over prospective subsequent entrants. Successful subsequent entry would be difficult and expensive. In the presence of these barriers, the only successful market entrant since the 1960s has been Discover. Even so, Discover's market share historically has been, and remains, very small. In 2009, Discover's market share based on dollar volume of purchases placed on General Purpose Cards was approximately 6%.

67. Defendants' Merchant Restraints heighten these barriers to competitors' expansion and entry. Merchants' inability to encourage their customers to use less costly General Purpose Card networks makes it even harder for existing or potential competitors to threaten Defendants' market power.

68. Each Defendant also has market power in the T&E market for General Purpose Card network services. Among Defendants, American Express' market power in the T&E market is the most substantial. American Express' share of transaction volume in this market is approximately 37%, while Visa's share is approximately 36% and MasterCard's share is approximately 24%. American Express is the market leader among networks in airline, lodging, and rental car merchant segments, capturing nearly $100 billion in transaction volume. American Express' average card acceptance fee for these three merchant segments was 12% higher than its average fee for all other merchant segments in 2009. American Express' costs in those segments are not proportionally higher than costs in most other segments; in many instances, they are lower. T&E merchant acceptance of American Express is extensive. American Express is the designated card for more business travelers than any other network's card. In fact, American Express accounts for 70% of all expenditures made with corporate cards, which consist largely of T&E merchant purchases. Most merchants in the T&E market have not declined to accept American Express' cards or its Merchant Restraints even when American Express has imposed card acceptance fees that are substantially higher than those set by other General Purpose Card brands, despite these merchants' strong desire not to accept those prices and restraints. Visa and MasterCard also price discriminate successfully against T&E merchants. For all of these reasons, each Defendant has market power in the T&E market.

IX. Harm to Competition

69. Each Defendants' vertical Merchant Restraints are directly aimed at restraining horizontal interbrand competition. Each Defendant's Merchant Restraints harm competition by:

(1) Harming the competitive process and disrupting the proper functioning of the price-setting mechanism of a free market;

(2) restraining merchants from encouraging or pressing each Defendant to compete over card acceptance fees;

(3) insulating each Defendant from competition from rival networks that would otherwise encourage merchants to favor use of those networks' cards;

(4) inhibiting other networks from competing on price at merchants that accept each Defendant's General Purpose Cards;

(5) restraining merchants from promoting payment methods other than each Defendant's General Purpose Cards;

(6) restraining merchants from competing for customers with discounts, promotions, or other forms of lower prices and other benefits enabled by customers' use of a lower cost General Purpose Card or other payment method;

(7) causing increased prices in the form of higher merchant card acceptance fees;

(8) causing increased retail prices for goods and services paid generally by customers;

(9) reducing output of lower-cost payment methods;

(10) stifling innovation in network services and card offerings that would emerge if competitors were forced to compete for merchant business at the point of sale; and

(11) denying consumers information about the relative costs of each Defendant's General Purpose Card usage compared to other card usage that would cause more consumers to choose lower-cost payment methods.

70. Defendants' Merchant Restraints substantially reduce price and non-price competition for merchant use of network services and interfere with price setting at the merchant point of sale. Without the Merchant Restraints, and faced with Defendants' high card acceptance fees, many merchants would encourage customers to use cards offered by the lowest-cost network. Without the Merchant Restraints, each Defendant would compete more vigorously. By imposing the Merchant Restraints, Defendants have insulated themselves from competition with each other and with any other network competitor at the merchant point of sale. The Merchant Restraints reduce incentives for Defendants to offer merchants lower-priced network services that would benefit consumers, because merchants cannot encourage customers to use the less expensive options without violating Defendants' Merchant Restraints. Each Defendant thus can maintain high prices for its network services with confidence that no competitor will take away significant transaction volume through competition in the form of merchant discounts or benefits to consumers to use lower cost payment options. Each Defendant's price for network services to merchants is higher than it would be without the Merchant Restraints.

LXXI. Although other payment methods are not in the product markets relevant to this action, there is some, more attenuated competition between General Purpose Cards and other payment methods. Defendants' Merchant Restraints also restrict the competition that exists and otherwise would emerge from these other payment methods.

LXXII. Because Defendants' Merchant Restraints obstruct merchants from encouraging customers to use less costly payment methods, merchants bear higher costs and their customers face higher retail prices. If a merchant cannot reduce its costs by encouraging cheaper payment methods or by encouraging competition among networks, the merchant will charge higher prices generally to its customers. A customer who pays with lower-cost methods of payment pays more than he or she would if Defendants did not prevent merchants from encouraging network competition at the point of sale. For example, because American Express General Purpose Cards typically are held by more affluent buyers, less affluent purchasers using non-premium General Purpose Cards, debit cards, cash, and checks effectively subsidize part of the cost of expensive American Express card benefits and rewards.

LXXIII. The fees Defendants impose on General Purpose Card transactions are largely not visible to consumers. The Merchant Restraints forbid merchants even from telling consumers simple factual information about what merchants have to pay when consumers use General Purpose Cards. This information could help merchants to encourage customers to choose more cost-effective payment methods. For example, those customers who prefer American Express services and value them at a competitive price could continue to choose them, but others

would not be forced to subsidize this choice by paying higher prices.

LXXIV. Authorities in other countries have taken actions to reduce or eliminate similar Merchant Restraints. In foreign jurisdictions where Defendants' Merchant Restraints have been relaxed, merchants have taken advantage of their ability to encourage customers to use less expensive General Purpose Cards or other payment methods.

LXXV. In short, Defendants' Merchant Restraints remove tools that merchants in a competitive marketplace would use to negotiate lower card acceptance fees, to reduce their costs of doing business, to empower their customers with information to make choices about payment methods, to encourage customers to choose a low-cost payment method, and to keep retail prices lower for their customers. As a result, merchants, consumers, and competition itself are harmed.

X. Violation Alleged

LXXVI. Each Defendant's Merchant Restraints constitute agreements that unreasonably restrain competition in the market for General Purpose Card network services to merchants, and in the market for General Purpose Card network services to T&E merchants, in the United States in violation of Section 1 of the Sherman Act, 15 U.S.C. 1.

LXXVII. These agreements have had and will continue to have anticompetitive effects by protecting Defendants from competition over the cost of card acceptance to merchants, and restraining merchants from encouraging customers to use lower-cost payment methods. Defendants' restraints unlawfully insulate Defendants' card acceptance fees from competition, increase costs of payment acceptance to merchants, increase prices, reduce output, harm the competitive process, raise barriers to entry and expansion, and retard innovation.

LXXVIII. These agreements are not reasonably necessary to accomplish any of Defendants' allegedly procompetitive goals. Any procompetitive benefits are outweighed by anticompetitive harm, and there are less restrictive alternatives by which Defendants would be able reasonably to achieve any procompetitive goals.

XI. Request for Relief

Wherefore, Plaintiffs pray that final judgment be entered against each Defendant declaring, ordering, and adjudging that:

a. The aforesaid agreements unreasonably restrain trade and are illegal under Section 1 of the Sherman Act, 15 U.S.C. 1;

b. Each Defendant be permanently enjoined from engaging in, enforcing, carrying out, renewing, or attempting to engage in, enforce, carry out, or renew the agreements in which it is alleged to have engaged, or any other agreement having a similar purpose or effect in violation of Section 1 of the Sherman Act, 15 U.S.C. 1;

c. Each Defendant eliminate and cease enforcing all Merchant Restraints and be prohibited from otherwise acting to restrain trade unreasonably;

d. Each Defendant fund and undertake programs to inform merchants of merchants' rights to encourage customers to use any payment method they choose; and

e. The United States be awarded its costs of this action and such other relief as may be appropriate and as the Court may deem just and proper, and the States be awarded their costs in this action, reasonable attorneys' fees, and such other relief as may be appropriate and as the Court may deem proper.

Dated: 10/4/2010.

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In The United States District Court For The Eastern District of New York

United States of America, State of Connecticut, State of Iowa, State of Maryland, State of Michigan, State of Missouri, State of Ohio, and State of Texas, Plaintiffs, v. *American Express Company, American Express Travel Related Services Company, Inc., Mastercard International Incorporated, and Visa Inc. Defendants.*

Civil Action No. CV–10–4496

(Garaufis, J.)
(Pollak, M.J.)

Competitive Impact Statement

Plaintiff United States of America ("United States"), pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA" or "Tunney Act"), 15 U.S.C. 16(b)–(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. Nature and Purpose of The Proceeding

The United States and the States of Connecticut, Iowa, Maryland, Michigan, Missouri, Ohio, and Texas ("Plaintiff States") brought this lawsuit against Defendants American Express Company, American Express Travel Related Services Company, Inc. (collectively, "American Express"), Visa Inc. ("Visa"), and MasterCard International Incorporated ("MasterCard") on October 4, 2010, challenging certain of Defendants' rules, policies, and practices that impede merchants from providing discounts or benefits to promote the use of a competing credit card that costs the merchant less to accept ("Merchant Restraints"). These Merchant Restraints have the effect of suppressing interbrand price and non-price competition in violation of Section 1 of the Sherman Act, 15 U.S.C. 1.

Shortly after the filing of the Complaint, the United States filed a proposed Final Judgment with respect to Defendants Visa and MasterCard. The proposed Final Judgment is described in more detail in Section III below. The United States, Plaintiff States, Visa, and MasterCard have stipulated that the proposed Final Judgment may be entered after compliance with the APPA, unless the United States withdraws its consent. Entry of the proposed Final Judgment would terminate this action as to Visa and MasterCard, except that this Court would retain jurisdiction to construe, modify, and enforce the proposed Final Judgment and to punish violations thereof. The case against American Express will continue.

II. Description of The Events Giving Rise to The Alleged Violation

A. Industry Background

Defendants provide network services for general purpose credit and charge cards ("General Purpose Cards"). Visa is the largest provider of network services in the United States and MasterCard is the second-largest, closely followed by American Express.

General Purpose Cards are forms of payment that allow cardholders to make purchases without accessing or reserving the cardholder's funds at the time of sale. General Purpose Cards include credit and charge cards issued to consumers and businesses, but do not include cards that can be used at only one merchant *(e.g.,* department store cards), cards that access funds on deposit (debit cards), or pre-paid cards (*e.g.,* gift cards). Acceptance of General Purpose Cards is widespread among merchants because many of their customers prefer to pay with such Cards, due to convenience, security, the ability to defer payment, and other factors.

Defendants, as providers of General Purpose Card network services, operate the infrastructure necessary to authorize, settle, and clear payments made with their General Purpose Cards. Millions of merchants around the United States that accept General Purpose Cards are consumers of network services.

The typical transaction involving a Visa or MasterCard General Purpose Card involves several steps. When a cardholder presents a card to a merchant, the bank that issued the card (the "issuing bank" or "issuer") authorizes the transaction using the card's network. Then the merchant's bank (the "acquiring bank") pays the merchant the amount of the purchase, minus a fee (the "merchant discount fee" or "card acceptance fee") that is shared among the acquiring bank, the network, and the issuing bank. The acquiring bank and the network collect relatively small portions of the merchant discount; the bulk of the merchant discount is collected by the issuing bank in the form of an "interchange fee." Interchange fees are set by the network and vary based on many factors such as the merchant's industry, the merchant's annual charge levels, and the type of card used in the transaction (*e.g.,* rewards card vs. non-rewards card).

American Express issues most of its General Purpose Cards directly to cardholders and generally provides network services directly to merchants. For each transaction, American Express imposes a merchant discount fee, which is typically a percentage of the transaction price. American Express has for many years maintained the highest merchant fees of any network, and American Express card acceptance often costs merchants substantially more than acceptance of other General Purpose Cards.

When merchants agree to accept a particular brand of General Purpose Card, they must use the network services provided by that brand. Merchants cannot reasonably replace General Purpose Card network services with other services or reduce usage of these network services, even if such network services are substantially more expensive for merchants relative to services that enable other payment methods. The challenged Merchant

Restraints obstruct the ability of a merchant to vary the amount of network services it buys in response to changes in the merchant's cost of acceptance by encouraging customers at the point of sale to use less-costly General Purpose Cards or other methods of payment.

B. The Challenged Merchant Restraints

When merchants agree to accept Visa or MasterCard General Purpose Cards, they sign a contract agreeing to abide by the rules promulgated by the network, including the Merchant Restraints at issue in this case. Merchants face penalties, including termination of their contracts, if they violate these rules.

The Visa Merchant Restraints challenged in the Complaint prohibit a merchant from offering a discount at the point of sale to a customer that chooses to use an American Express, Discover, or MasterCard General Purpose Card instead of a Visa General Purpose Card. Visa's rules do not allow discounts for other General Purpose Cards, unless such discounts are equally available for Visa transactions. See Complaint ¶ 26 (citing Visa International Operating Regulations at 445 (April 1, 2010) (Discount Offer—U.S. Region 5.2.D.2)).

The MasterCard Merchant Restraints challenged in the Complaint prohibit a merchant from "engag[ing] in any acceptance practice that discriminates against or discourages the use of a [MasterCard] Card in favor of any other acceptance brand." *See* Complaint ¶ 27 (quoting MasterCard Rule 5.11.1). This means that merchants cannot offer discounts or other benefits to persuade customers to use an American Express, Discover, or Visa General Purpose Card instead of a MasterCard General Purpose Card. *Id.* MasterCard does not allow merchants to favor competing card brands. *Id.*

The challenged Merchant Restraints imposed by Defendants deter or obstruct merchants from freely promoting interbrand competition among networks by offering customers discounts, other benefits, or information to encourage them to use a less-expensive General Purpose Card brand or other payment method. The Merchant Restraints block merchants from taking steps to influence customers and foster competition among networks at the point of sale, such as: promoting a less-expensive General Purpose Card brand more actively than any other brand; offering customers a discount or other benefit for using a particular General Purpose Card that costs the merchant less; posting a sign expressing a preference for another General Purpose Card brand; prompting customers at the point of sale to use another General Purpose Card brand in their wallets; posting the signs or logos of General Purpose Card brands that cost less to the merchant more prominently than signs or logos of more costly brands; or posting truthful information comparing the relative costs of different General Purpose Card brands.[1]

C. The Relevant Markets

The Complaint alleges two distinct relevant product markets: the market for General Purpose Card network services to merchants, and the market for General Purpose Card network services to travel and entertainment merchants ("T&E market"). In each case, the relevant geographic market is the United States.

1. The General Purpose Card Network Services Market

A relevant product market for this case is the provision of General Purpose Card network services to merchants. For such merchants, there are no reasonable substitutes for network services. Competition from other payment methods would not be sufficient to prevent a hypothetical monopolist of General Purpose Card network services from profitably maintaining supracompetitive prices and terms for network services provided to merchants over a sustained period of time or from imposing anticompetitive conditions on merchants.

Defendants possess market power in the network services market. In 2003, the United States Court of Appeals for the Second Circuit affirmed that Visa and MasterCard hold market power in a General Purpose Card network services market. *United States* v. *Visa U.S.A., Inc.,* 344 F.3d 229, 238–39 (2d Cir. 2003). American Express' share of General Purpose Card transaction volume today is close to MasterCard's, and similar to MasterCard's share at the time of the Second Circuit's decision.

Because of the Merchant Restraints, a merchant is obstructed in its ability to reduce its purchases of one network's services by encouraging its customers to choose a competing network's General Purpose Card. A merchant may resist a Defendant's high card acceptance fees only by no longer accepting that Defendant's General Purpose Cards. This all-or-nothing choice does not effectively constrain Defendants' market power because merchants cannot refuse to accept these General Purpose Cards without alienating customers and losing significant sales. The Merchant Restraints leave merchants less able to avoid Defendants' supracompetitive prices than they otherwise would be.

Defendants' ability to discriminate in the prices they charge different types of merchants, unexplained by cost differences, also reflects their market power. Defendants target specific merchant segments for differential pricing based on those merchants' ability to pay and their inability to refuse to accept Defendants' General Purpose Cards.

Significant barriers to entry and expansion protect Defendants' market power, and have contributed to Defendants' ability to maintain high prices for years without threat of price competition by new entry or expansion in the market. Barriers to entry and expansion include the prohibitive cost of establishing a physical network over which General Purpose Card transactions can run, developing a widely recognized brand, and establishing a base of merchants and a base of cardholders. Defendants, which achieved these necessities early in the history of the industry, hold substantial early-mover advantages over prospective subsequent entrants. Successful entry today would be difficult, time consuming, and expensive.

2. The T&E Market

Another relevant market consists of General Purpose Card network services provided to merchants in travel and entertainment businesses (*e.g.,* merchants offering air travel, lodging, or rental cars). The T&E market is what is sometimes termed a "price discrimination market." Merchants in this market share distinct characteristics in their usage of General Purpose Card network services, can be readily identified by Defendants, and are subject to price discrimination by Defendants. Price discrimination occurs when a seller charges different customers (or groups of customers) different prices for the same services, when those different prices are not based on different costs of serving those customers.

Here, Defendants charge merchants in the T&E sector higher fees than they charge most other merchants. The high fees to T&E merchants are not based on Defendants' higher costs of serving their T&E merchants. Each Defendant can

[1] Federal law mandates that networks permit merchants to offer discounts for cash transactions. Additionally, the new Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, by adding section 920 to the Electronic Fund Transfer Act, 15 U.S.C. 1693 *et seq.,* now forbids networks from prohibiting merchants from offering a discount for an entire payment method category, such as a discount for use of any debit card. All General Purpose Card networks operate under these laws. The Complaint does not seek relief relating to these two types of discounting.

charge T&E merchants high fees because those merchants are even less able to substitute away to other networks than other merchants.

Competition from other payment methods would not be sufficient to prevent a hypothetical monopolist in the T&E market from either profitably maintaining supracompetitive prices and terms for network services to T&E merchants over a sustained period of time or imposing anticompetitive conditions on T&E merchants in that market. A hypothetical monopolist could price discriminate profitably against T&E merchants even if other merchants were paying lower prices for network services.

Each Defendant holds market power in the T&E market. As with the market for General Purpose Card network services, discussed above, significant barriers to entry and expansion protect the market for network services to T&E merchants.

D. The Competitive Effects of the Alleged Violation

The Complaint alleges that Defendants' Merchant Restraints suppress price and non-price competition by prohibiting a merchant from offering discounts or other benefits to customers for the use of a particular General Purpose Card. These prohibitions allow Defendants to maintain high prices for network services with confidence that no competitor will take away significant transaction volume through competition in the form of merchant discounts or benefits to customers to use lower cost payment options. Defendants' prices for network services to merchants are therefore higher than they would be without the Merchant Restraints.

Absent the Merchant Restraints, merchants would be free to use various methods, such as discounts or non-price benefits, to encourage customers to use the brands of General Purpose Cards that impose lower costs on the merchants. In order to retain merchant business, the networks would need to respond to merchant preferences by competing more vigorously on price and service to merchants. The increased competition among networks would lead to lower merchant fees and better service terms.

Because the Merchant Restraints result in higher merchant costs, and merchants pass these costs on to consumers, retail prices are higher generally for consumers. Moreover, a customer who pays with lower-cost methods of payment pays more than he or she would if Defendants did not prevent merchants from encouraging network competition at the point of sale. For example, because certain types of premium General Purpose Cards tend to be held by more affluent buyers, less affluent purchasers using non-premium General Purpose Cards, debit cards, cash, and checks effectively subsidize part of the cost of expensive premium card benefits and rewards enjoyed by those cardholders.

The Complaint also alleges that the Merchant Restraints have had a number of other anticompetitive effects, including reducing output of lower-cost payment methods, stifling innovation in network services and card offerings, and denying information to customers about the relative costs of General Purpose Cards that would cause more customers to choose lower-cost payment methods. Defendants' Merchant Restraints also have heightened the already high barriers to entry and expansion in the network services market. Merchants' inability to encourage their customers to use less-costly General Purpose Card networks makes it more difficult for existing or potential competitors to threaten Defendants' market power.

Finally, the Complaint alleges that these anticompetitive effects are not outweighed by any allegedly procompetitive goals of the Merchant Restraints, and there are less restrictive alternatives by which Defendants would be able reasonably to achieve any procompetitive goals.

III. Explanation of The Proposed Final Judgment

The prohibitions and required conduct in the proposed Final Judgment achieve all the relief sought from Visa and MasterCard in the Complaint, and thus fully resolve the competitive concerns raised by those Defendants' Merchant Restraints challenged in this lawsuit.

The proposed Final Judgment prohibits Visa and MasterCard from adopting, maintaining, or enforcing any rule, or entering into or enforcing any agreement, that prevents any merchant from: (1) Offering the customer a price discount, rebate, free or discounted product or service, or other benefit if the customer uses a particular brand or type of General Purpose Card or particular form of payment; (2) expressing a preference for the use of a particular brand or type of General Purpose Card or particular form of payment; (3) promoting a particular brand or type of General Purpose Card or particular form of payment through posted information; through the size, prominence, or sequencing of payment choices; or through other communications to the customer; or (4) communicating to customers the reasonably estimated or actual costs incurred by the merchant when a customer pays with a particular brand or type of General Purpose Card. Proposed Final Judgment § IV.A.

For purposes of the Final Judgment, the "brand" of a General Purpose Card refers to its network (*e.g.,* American Express, Discover, MasterCard, or Visa). *Id.* § II.3. The "type" of a General Purpose Card refers to the network's card categories, such as premium cards (*e.g.,* a "Visa Signature Card" or a "World MasterCard"), rewards cards, or traditional cards. *Id.* § II.16. The term "form of payment" is defined as any means by which customers pay for goods and services, including cash, a check, a debit card, a prepaid card, or other means. *Id.* § II.7. The definition includes particular brands or types of debit cards.

The purpose of Section IV.A is to free merchants to influence the method of payment used by their customers by providing them information, discounts, benefits, and choices at the point of sale. For example, merchants will be able to encourage customers, using the methods described in Section IV.A, to use one General Purpose Card instead of another, to use one type of General Purpose Card instead of another (such as by offering a discount for the use of a cheaper non-rewards Visa card instead of a premium-level Visa rewards card), or to use a different General Purpose Card or form of payment than the General Purpose Card the customer initially presents to the merchant. Merchants will also be able to encourage the use of any other payment form, such as cash, check, or debit cards, by using the methods described in Section IV.A.

To clarify the scope of the conduct prohibited by the proposed Final Judgment, Section IV.B provides that Visa and MasterCard would not violate the Final Judgment if they established agreements with merchants, pursuant to which: (1) The merchant agrees to accept only one brand of General Purpose Card; (2) the merchant encourages customers to use co-branded or affinity General Purpose Cards with the merchant's own brand on the card, and not other General Purpose Cards; or (3) the merchant encourages customers to use only one brand of General Purpose Card.[2] The General Purpose Card networks likely will compete with

[2] Visa and MasterCard may enter into the latter type of agreement subject to certain conditions: (a) The agreement is individually negotiated with the merchant and is not part of a standard merchant contract; and (b) the merchant's acceptance of the Defendant's General Purpose Card is unrelated to, and not conditioned on, the merchant's entry into the agreement. *Id.* § IV.B.3.

each other to enter these types of agreements, to the benefit of merchants and consumers.

Section IV.B also allows Visa and MasterCard to have a network rule that prohibits a merchant from encouraging customers to use the General Purpose Cards of one issuing bank instead of those of another issuing bank.

Section IV.C allows Visa and MasterCard to have a network rule that prohibits a merchant from disparaging the network's brand, as long as that rule does not restrict a merchant's ability to encourage customers to use other General Purpose Cards or forms of payment.

To facilitate merchants' ability to encourage customers to use particular General Purpose Cards, Section IV.D prevents Visa and MasterCard from denying merchants access to information from their acquiring banks about the cost of each type of General Purpose Card.

Section V of the proposed Final Judgment requires Visa and MasterCard, within five days of entry of the Judgment, to "delete, discontinue, and cease to enforce" any rule that would be prohibited by Section IV of the Final Judgment. *Id.* § V.A. Sections V.B and V.C require Visa and MasterCard to make specific changes to their rules and regulations governing merchant conduct to implement the requirements of Section IV. Section V also directs Visa and MasterCard, through their acquiring banks, to notify merchants of the rules changes mandated by the Final Judgment, and of the fact that merchants are now permitted to encourage customers to use a particular General Purpose Card or form of payment. Acquiring banks must also provide merchants with a copy of the Final Judgment. Finally, Section V requires Visa and MasterCard to adopt rules that prohibit their acquiring banks from adopting, maintaining, or enforcing any rule that would be inconsistent with the prohibitions of Section IV of the Final Judgment.

To aid in enforcement, the proposed Final Judgment requires Visa and MasterCard to notify the Department of Justice of any future rule change that limits or restrains "how Merchants accept, process, promote, or encourage use of Forms of Payment other than General Purpose Cards or of General Purpose Cards bearing the Brand of another General Purpose Card Network." *Id.* § V.F.

The proposed Final Judgment expressly states that there is no limitation on the United States' (or the Plaintiff States') ability to investigate and bring an antitrust enforcement action in the future concerning any rule of either Visa or MasterCard, including any rule either of them may adopt in the future. *Id.* § VIII. Merchants that currently accept only Visa or MasterCard, or both, will benefit immediately from the Final Judgment by having the freedom to encourage their customers to choose the merchants' preferred method of payment. Merchants will have several new options available to accomplish this, such as offering customers a price discount, a rebate, a free product or service, rewards program points, or other benefits; placing signs that encourage customers to use particular payment methods; prompting customers to use particular General Purpose Cards or other forms of payment; or communicating to customers the costs of particular forms of payment.

Merchants that accept American Express cards, including the vast majority of the major retailers in the United States, will be unable to influence customers' payment methods because the anticompetitive American Express Merchant Restraints will continue to constrain those merchants pending the outcome of this litigation. American Express stands as the last obstacle to achieving the full benefits of competition now suppressed by the challenged Merchant Restraints. The United States will continue this case against American Express to obtain complete relief for the affected merchants, and for the benefit of their customers.

IV. Remedies Available To Potential Private Litigants

Section 4 of the Clayton Act, 15 U.S.C. 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. 16(a), the proposed Final Judgment has no prima facie effect in any private lawsuit that may be brought against Defendants.

V. Procedures Available For Modification of The Proposed Final Judgment

The United States, Plaintiff States, Visa, and MasterCard have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty (60) days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the **Federal Register**, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the United States Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to the Court's entry of judgment. The comments and the response of the United States will be filed with the Court and published in the **Federal Register**.

Written comments should be submitted to: John R. Read, Chief, Litigation III Section, Antitrust Division, United States Department of Justice, 450 Fifth Street, NW., Suite 4000, Washington, DC 20530.

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI. Alternatives To The Proposed Final Judgment

The United States considered, as an alternative to the proposed Final Judgment, proceeding to a full trial on the merits against Visa and MasterCard. The United States is satisfied, however, that the prohibitions and requirements contained in the proposed Final Judgment will fully address the competitive concerns set forth in the Complaint against Visa and MasterCard. The proposed Final Judgment achieves all or substantially all of the relief the United States would have obtained through litigation against Visa and MasterCard, and will avoid the delay, risks, and costs of a trial on the merits of the Complaint.[3]

[3] The Antitrust Division has investigated a number of Defendants' other merchant rules, including the prohibition on surcharging, that are not challenged in this Complaint. Tunney Act review is limited to the scope of the complaint and the court may not "reach beyond the complaint to evaluate claims that the government did not make

Continued

VII. Standard of Review Under The APPA For The Proposed Final Judgment

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after which the court shall determine whether entry of the proposed Final Judgment "is in the public interest." 15 U.S.C. 16(e)(1). In making that determination, the court, in accordance with the statute as amended in 2004, is required to consider:

(A) The competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and

(B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. 16(e)(1)(A) & (B). In considering these statutory factors, the court's inquiry is necessarily a limited one as the United States is entitled to "broad discretion to settle with the defendant within the reaches of the public interest." *United States* v. Microsoft Corp., 56 F.3d 1448, 1461 (DC Cir. 1995); *see also United States* v. *Alex Brown & Sons, Inc.,* 963 F. Supp. 235, 238 (S.D.N.Y. 1997) (noting that the court's role in the public interest determination is "limited" to "ensur[ing] that the resulting settlement is 'within the reaches of the public interest' ") (quoting *Microsoft,* 56 F.3d at 1460), *aff'd sub nom. United States* v. *Bleznak,* 153 F.3d 16 (2d Cir. 1998); *United States* v. *SBC Commc'ns, Inc.,* 489 F. Supp. 2d 1 (D. DC 2007) (assessing public interest standard under the Tunney Act); *United States* v. *InBev N.V./S.A.,* 2009–2 Trade Cas. (CCH) ¶76,736, 2009 U.S. Dist. LEXIS 84787, No. 08–1965 (JR), at *3, (D. DC Aug. 11, 2009) (noting that the court's review of a consent judgment is limited and only inquires "into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanism to enforce the final judgment are clear and manageable.").[4]

As the United States Court of Appeals for the District of Columbia Circuit has held, a court considers under the APPA, among other things, the relationship between the remedy secured and the specific allegations set forth in the United States' complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See Microsoft,* 56 F.3d at 1458–62. With respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States* v. *BNS, Inc.,* 858 F.2d 456, 462 (9th Cir. 1988) (citing *United States* v. *Bechtel Corp.,* 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft,* 56 F.3d at 1460–62; *Alex Brown,* 963 F. Supp. at 238; *United States* v. *Alcoa, Inc.,* 152 F. Supp. 2d 37, 40 (D. DC 2001); *InBev,* 2009 U.S. Dist. LEXIS 84787, at *3. Courts have held that:

[t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "*within the reaches of the public interest.*" More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree. *Bechtel,* 648 F.2d at 666 (emphasis added) (citations omitted).[5]

In determining whether a proposed settlement is in the public interest, a district court "must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations." *SBC Commc'ns,* 489 F. Supp. 2d at 17; *see also Microsoft,* 56 F.3d at 1461 (noting the need for courts to be "deferential to the government's predictions as to the effect of the proposed remedies"); *Alex Brown,* 963 F. Supp. at 239 (stating that the court should give "due deference to the Government's evaluation of the case and the remedies available to it"); *United States* v. *Archer-Daniels-Midland* Co., 272 F. Supp. 2d 1, 6 (D. DC 2003) (noting that the court should grant due respect to the United States' "prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case").

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.' " *United States* v. *Am. Tel. & Tel. Co.,* 552 F. Supp. 131, 151 (D. DC 1982) (citations omitted) (quoting *United States* v. *Gillette Co.,* 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff'd sub nom. Maryland* v. *United States,* 460 U.S. 1001 (1983); *see also United States* v. *Alcan Aluminum Ltd.,* 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). To meet this standard, the United States "need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms." *SBC Commc'ns,* 489 F. Supp. 2d at 17.

Moreover, the court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its complaint, and does not authorize the court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft,* 56 F.3d at 1459; *see also InBev,* 2009 U.S.

and to inquire as to why they were not made." *United States* v. *Microsoft,* 56 F.3d 1448, 1459–60 (DC Cir. 1995); *see also infra* § VII, at 20. The proposed Final Judgment contains a clause preserving the rights of the United States and providing that "[n]othing in this Final Judgment shall limit the right of the United States or of the Plaintiff States to investigate and bring actions to prevent or restrain violations of the antitrust laws concerning any Rule of MasterCard or Visa, including any current Rule and any Rule adopted in the future." Proposed Final Judgment § VIII. At this time, the United States takes no position on whether any Visa or MasterCard rule not challenged in the Complaint is in violation of the antitrust laws.

[4] The 2004 amendments substituted "shall" for "may" in directing relevant factors for the court to consider and amended the list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms. *Compare* 15 U.S.C. 16(e) (2004), *with* 15 U.S.C. 16(e)(1) (2006); *see also SBC Commc'ns,* 489 F. Supp. 2d at 11 (concluding that the 2004 amendments "effected minimal changes" to Tunney Act review).

[5] *Cf. BNS,* 858 F.2d at 464 (holding that the court's "ultimate authority under the [APPA] is limited to approving or disapproving the consent decree"); *United States* v. *Gillette Co.,* 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that, in this way, the court is constrained to "look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass"); *see generally Microsoft,* 56 F.3d at 1461 (discussing whether "the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest' ").

Dist. LEXIS 84787, at *20 ("the 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged"). Because the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that "the court is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States did not pursue. *Microsoft,* 56 F.3d at 1459–60. As the United States District Court for the District of Columbia recently confirmed in *SBC Communications,* courts "cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power." *SBC Commc'ns,* 489 F. Supp. 2d at 15.

In its 2004 amendments, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction that "[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. 16(e)(2). This language effectuates what Congress intended when it enacted the Tunney Act in 1974. As Senator Tunney explained: "[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong. Rec. 24,598 (1973) (statement of Senator Tunney). Rather, the procedure for the public interest determination is left to the discretion of the court, with the recognition that the court's "scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings." *SBC Commc'ns,* 489 F. Supp. 2d at 11.[6]

[6] *See United States* v. *Enova Corp.,* 107 F. Supp. 2d 10, 17 (D. DC 2000) (noting that the "Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone"); *United States* v. *Mid-Am. Dairymen, Inc.,* 1977–1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977) ("Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should * * * carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances."); S. Rep. No. 93–298, 93d Cong., 1st Sess., at 6 (1973) ("Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.").

VIII. Determinative Documents

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment. Respectfully submitted, Craig W. Conrath, Michael G. Dashefsky, Justin M. Dempsey, Mark H. Hamer, Gregg I. Malawer, Bennett J. Matelson, Anne Newton McFadden, Rachel L. Zwolinski.

Attorneys for the United States, United States Department of Justice, Antitrust Division, Litigation III, 450 Fifth Street, NW., Suite 4000, Washington, DC 20530.

Dated: October 4, 2010

In The United States District Court For The Eastern District of New York

United States of America, State of Connecticut, State of Iowa, State Of Maryland, State of Michigan, State of Missouri, State of Ohio, and State of Texas, Plaintiffs, v. *American Express Company, American Express Travel Related Services Company, Inc., Mastercard International Incorporated, and Visa Inc. Defendants.*

Civil Action No. CV–10–4496

(Garaufis, J.)
(Pollak, M.J.)

[Proposed] Final Judgment as to Defendants Mastercard International Incorporated and Visa Inc.

Whereas, Plaintiffs, the United States of America and the States of Connecticut, Iowa, Maryland, Michigan, Missouri, Ohio, and Texas filed their Complaint on October 4, 2010, alleging that Defendants each adopted rules that restrain Merchants from encouraging consumers to use preferred payment forms, harming competition and consumers in violation of Section 1 of the Sherman Act, 15 U.S.C. 1, and Plaintiffs and Defendants MasterCard International Incorporated and Visa Inc., by their respective attorneys, have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law;

Whereas, Defendants MasterCard and Visa have not admitted and do not admit either the allegations set forth in the Complaint or any liability or wrongdoing;

And whereas, Defendants MasterCard and Visa agree to be bound by the provisions of this Final Judgment pending its approval by the Court;

Now therefore, before any testimony is taken, without trial or adjudication of any issue of fact or law, without this Final Judgment constituting any evidence against or admission by Defendants MasterCard or Visa regarding any issue of fact or law, and upon consent of MasterCard and Visa, it is *ordered, adjudged and decreed:*

I. Jurisdiction

This Court has jurisdiction over the subject matter of this action and over MasterCard and Visa. The Complaint states a claim upon which relief may be granted against MasterCard and Visa under Section 1 of the Sherman Act, as amended, 15 U.S.C. 1.

II. Definitions

As used in this Final Judgment:

1. "*Acquiring Bank*" means a Person authorized by MasterCard or Visa to enter into agreements with Merchants to accept MasterCard's or Visa's General Purpose Cards as payment for goods or services.

2. "*American Express*" means American Express Company, a New York corporation with its principal place of business in New York, New York, and American Express Travel Related Services Company, Inc., a Delaware corporation with its principal place of business in New York, New York, their successors and assigns, and their subsidiaries (whether partially or wholly owned), divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

3. "*Brand*" means the brand or mark of a General Purpose Card Network.

4. "*Customer*" means a Person that pays for goods or services.

5. "*Department of Justice*" means the United States Department of Justice, Antitrust Division.

6. "*Discover*" means Discover Financial Services, a Delaware corporation with its principal place of business in Riverwoods, Illinois, its successors and assigns, and its subsidiaries (whether partially or wholly owned), divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

7. "*Form of Payment*" means cash, a check, a debit card, a prepaid card, or any other means by which Customers pay for goods or services, and includes particular brands (*e.g.,* Star, NYCE) or types (*e.g.,* PIN debit) of debit cards or other means of payment.

8. "*General Purpose Card*" means a credit or charge card issued pursuant to Rules of a General Purpose Card Network that enables consumers to make purchases from unrelated Merchants without accessing or reserving funds, regardless of any other functions the card may have.

9. "*General Purpose Card Network*" means any Person that directly or

indirectly assembles a group of unrelated Merchants to accept and a group of unrelated consumers to make purchases with General Purpose Cards bearing the Person's Brand, and includes General Purpose Card Networks such as Visa, MasterCard, American Express, and Discover.

10. "*Issuing Bank*" means a Person authorized by MasterCard or Visa to enter into agreements with cardholders for the use of that Defendant's General Purpose Cards for payment at a Merchant.

11. "*MasterCard*" means MasterCard International Incorporated, a Delaware corporation with its principal place of business in Purchase, New York, its successors and assigns, and its subsidiaries (whether partially or wholly owned), divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

12. "*Merchant*" means a Person that accepts MasterCard's or Visa's General Purpose Cards as payment for goods or services.

13. "*Person*" means any natural person, corporation, company, partnership, joint venture, firm, association, proprietorship, agency, board, authority, commission, office, or other business or legal entity, whether private or governmental.

14. "*Plaintiff States*" means the States of Connecticut, Iowa, Maryland, Michigan, Missouri, Ohio, and Texas.

15. "*Rule*" means any rule, bylaw, policy, standard, guideline, or practice applicable to Merchants in the United States.

16. "*Type*" means a category of General Purpose Cards, including but not limited to traditional cards, rewards cards, or premium cards (*e.g.,* a "Visa Signature Card" or a "World MasterCard").

17. "*Visa*" means Visa Inc., a Delaware corporation with its principal place of business in San Francisco, California, its successors and assigns, and its subsidiaries (whether partially or wholly owned), divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees, but shall not include Visa Europe Limited and its wholly owned affiliates.

18. The terms "and" and "or" have both conjunctive and disjunctive meanings.

III. Applicability

This Final Judgment applies to MasterCard and Visa and all other Persons in active concert or participation with any of them who receive actual notice of this Final Judgment by personal service or otherwise.

IV. Prohibited Conduct

A. The purpose of this Section IV is to allow Merchants to attempt to influence the General Purpose Card or Form of Payment Customers select by providing choices and information in a competitive market. This Final Judgment should be interpreted to promote such efforts and not limit them. Accordingly, neither MasterCard nor Visa shall adopt, maintain, or enforce any Rule, or enter into or enforce any agreement that directly or indirectly prohibits, prevents, or restrains any Merchant in the United States from

1. Offering the Customer a discount or rebate, including an immediate discount or rebate at the point of sale, if the Customer uses a particular Brand or Type of General Purpose Card, a particular Form of Payment, or a Brand or Type of General Purpose Card or a Form of Payment other than the General Purpose Card the Customer initially presents;

2. offering a free or discounted product if the Customer uses a particular Brand or Type of General Purpose Card, a particular Form of Payment, or a Brand or Type of General Purpose Card or a 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 Brand or Type of General Purpose Card, a particular Form of Payment, or a Brand or Type of General Purpose Card or a 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 Brand or Type of General Purpose Card, a particular Form of Payment, or a Brand or Type of General Purpose Card or a 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 a particular Form or Forms of Payment through posted information, through the size, prominence, or sequencing of payment choices, or through other communications to a Customer;

7. communicating to a Customer the reasonably estimated or actual costs incurred by the Merchant when a Customer uses a particular Brand or Type of General Purpose Card or a particular Form of Payment or the relative costs of using different Brands or Types of General Purpose Cards or different Forms of Payment; or

8. engaging in any other practices substantially equivalent to the practices described in Sections IV.A.1 through IV.A.7 of this Final Judgment.

B. Subject to compliance with the antitrust laws, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, and any other applicable state or federal law, nothing in this Final Judgment shall prohibit MasterCard or Visa from

1. Enforcing existing agreements or entering into agreements pursuant to which a Merchant selects General Purpose Cards bearing the Defendant's Brand as the only General Purpose Cards the Merchant will accept as payment for goods and services;

2. enforcing existing agreements or entering into agreements pursuant to which a Merchant agrees that it will encourage Customers to use co-branded or affinity General Purpose Cards bearing both the Defendant's Brand and the co-brand or affinity partner's name, logo, or brand as payment for goods and services and will not encourage Customers to use General Purpose Cards bearing the Brand of any other General Purpose Card Network;

3. enforcing existing agreements or entering into agreements pursuant to which a Merchant agrees (i) that it will encourage Customers, through practices enumerated in Sections IV.A.1 through IV.A.8 of this Final Judgment, to use General Purpose Cards bearing the Defendant's Brand as payment for goods and services, and (ii) that it will not use one or more practices enumerated in Sections IV.A.1 thorough IV.A.8 of this Final Judgment to encourage Customers to use General Purpose Cards bearing any other Person's Brand as payment for goods and services; *provided that* (a) any such agreement is individually negotiated with the Merchant and is not a standard agreement or part of a standard agreement generally offered by the Defendant to multiple Merchants, and (b) the Merchant's acceptance of the Defendant's General Purpose Cards as payment for goods and services is unrelated to and not conditioned upon the Merchant's entry into any such agreement;

4. adopting, maintaining, and enforcing Rules that prohibit Merchants from encouraging Customers to pay for goods or services using one of its General Purpose Cards issued by one particular Issuing Bank rather than by another of its General Purpose Cards issued by any other Issuing Bank.

C. Subject to Section IV.A of this Final Judgment, nothing in this Final

Judgment shall prohibit MasterCard or Visa from adopting, maintaining, and enforcing Rules that prohibit Merchants from disparaging its Brand.

D. Neither MasterCard nor Visa shall adopt, maintain, or enforce any Rule, or enter into or enforce any agreement, that prohibits, prevents, restrains, deters, or inhibits an Acquiring Bank from supplying a Merchant, on a transaction-by-transaction or other basis, information regarding the costs or fees the Merchant would incur in accepting a General Purpose Card, including a particular Type of General Purpose Card, presented by the Customer as payment for that Customer's transaction.

V. Required Conduct

A. Within five business days after entry of this Final Judgment, MasterCard and Visa shall each delete, discontinue, and cease to enforce in the United States any Rule that it would be prohibited from adopting, maintaining, or enforcing pursuant to Section IV of this Final Judgment.

B. Within five business days after entry of this Final Judgment, Visa shall modify the following portion of its Visa International Operating Regulations "Discount Offer—U.S. Region 5.2.D.2" as follows:

Current language: Discount Offer—U.S. Region 5.2.D.2.

In the U.S. Region, any purchase price advertised or otherwise disclosed by the Merchant must be the price associated with the use of a Visa Card or Visa Electron Card.

A U.S. 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
- 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). 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. Any discount made available to a Cardholder who pays with a Visa Card is not required to be offered to cardholders who pay with "comparable cards."

Modified language: Discount Offer—U.S. Region 5.2.D.2

A U.S. Merchant may request or encourage a Cardholder to use a means of payment other than a Visa Card or a Visa Card of a different product type (*e.g.,* Visa Classic Card, Visa Traditional Rewards Card, Visa Signature Card) than the Visa Card the consumer initially presents. Except where prohibited by law, the Merchant may do so by methods that include, but are not limited to:

- Offering the consumer an immediate discount from the Merchant's list, stated, or standard price, a rebate, a free or discounted product or service, or any other incentive or benefit if the consumer uses a particular general purpose payment card with an acceptance brand other than a Visa Card or other particular means of payment
- Offering the consumer an immediate discount from the Merchant's list, stated, or standard price, a rebate, a free or discounted product or service, or any other incentive or benefit if the consumer, who initially presents a Visa Card, uses instead another general purpose payment card or another means of payment
- Expressing a preference for the use of a particular general purpose payment card or means of payment
- Promoting the use of a particular general purpose payment card with an acceptance brand other than Visa or means of payment through posted information, through the size, prominence, or sequencing of payment choices, or through other communications to consumers
- Communicating to consumers the reasonably estimated or actual costs incurred by the Merchant when a consumer uses a particular general purpose payment card or means of payment or the relative costs of using different general purpose payment cards or means of payment.

C. Within five business days after entry of this Final Judgment, MasterCard shall modify its *MasterCard Rules,* Rule 5.11.1 "Discrimination" in the United States as follows:

Current language: A Merchant must not engage in any acceptance practice that discriminates against or discourages the use of a Card in favor of any other acceptance brand.

Modified language: A Merchant may request or encourage a customer to use a payment card with an acceptance brand other than MasterCard or other form of payment or a Card of a different product type (*e.g.,* traditional cards, premium cards, rewards cards) than the Card the consumer initially presents.

Except where prohibited by law, it may do so by methods that include, but are not limited to: (a) Offering the customer an immediate discount from the Merchant's list, stated, or standard price, a rebate, a free or discounted product or service, or any other incentive or benefit if the customer uses a particular payment card with an acceptance brand other than MasterCard or other particular form of payment; (b) offering the customer an immediate discount from the Merchant's list, stated, or standard price, a rebate, a free or discounted product or service, or any other incentive or benefit if the customer, who initially presents a MasterCard, uses instead another payment card or another form of payment; (c) expressing a preference for the use of a particular payment card or form of payment; (d) promoting the use of a particular general purpose payment card with an acceptance brand other than MasterCard or the use of a particular form or forms of payment through posted information, through the size, prominence, or sequencing of payment choices, or through other communications to customers (provided that merchants will abide by MasterCard's trademark standards relating to the display of its marks); or (e) communicating to customers the reasonably estimated or actual costs incurred by the Merchant when a customer uses particular payment cards or forms of payment or the relative costs of using different general purpose payment cards or forms of payment.

D. Within ten business days after entry of this Final Judgment, MasterCard and Visa shall each furnish to the Department of Justice and the Plaintiff States an affidavit affirming that it has made the specific changes to its Rules required by Sections V.B (for Visa) and V.C (for MasterCard) of this Final Judgment and describing any additional changes, if any, it made pursuant to Section V.A of this Final Judgment.

E. MasterCard and Visa shall each take the following actions to ensure that Merchants that accept its General Purpose Cards as payment for goods or services (i) are notified of this Final Judgment and the Rules changes MasterCard and Visa make pursuant to this Final Judgment; and (ii) are not restricted, discouraged, or prevented from engaging in any of the practices enumerated in Sections IV.A.1 through IV.A.8 of this Final Judgment:

1. Within ten business days after entry of this Final Judgment, MasterCard and Visa shall each furnish to the Department of Justice and the Plaintiff States, for the approval of the

Department of Justice, a proposed form of written notification to be provided to Acquiring Banks for distribution to Merchants:

a. describing the Rules changes each made pursuant to this Final Judgment; and

b. informing Merchants that they are permitted to engage in any of the practices enumerated in Sections IV.A.1 through IV.A.8 of this Final Judgment.

Within five business days after receiving the approval of the Department of Justice, the Defendant shall direct its Acquiring Banks to furnish to each of the Merchants in the United States with which the Acquiring Banks have entered an agreement to accept the Defendant's General Purpose Cards as payment for goods or services (i) a paper or electronic copy of the approved notification and (ii) a paper or electronic copy of this Final Judgment (or an Internet link to this Final Judgment). MasterCard and Visa shall direct the Acquiring Banks to provide such information in their next billing statement or within thirty days of their receipt of MasterCard's or Visa's direction, whichever is shorter.

2. Within five business days after entry of this Final Judgment, MasterCard and Visa shall each adopt a Rule forbidding its Acquiring Banks from adopting, maintaining, or enforcing Rules with respect to MasterCard or Visa General Purpose Cards that the Defendant would be prohibited from adopting, maintaining, or enforcing pursuant to Section IV of this Final Judgment.

F. MasterCard and Visa shall each notify the Department of Justice and the Plaintiff States, within five business days of such adoption or modification, if it adopts a new Rule that limits or restrains, or modifies an existing Rule in a manner that limits or restrains how Merchants accept, process, promote, or encourage use of Forms of Payment other than General Purpose Cards or of General Purpose Cards bearing the Brand of another General Purpose Card Network.

VI. Compliance Inspection

I. For purposes of determining or securing compliance with this Final Judgment, or of determining whether the Final Judgment should be modified or vacated, and subject to any legally recognized privilege, from time to time duly authorized representatives of the Department of Justice, including consultants and other persons retained by the Department of Justice, shall, upon written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to MasterCard or Visa, be permitted:

A. access during the Defendant's office hours to inspect and copy, or at the option of the United States, to require the Defendant to provide to the United States and the Plaintiff States hard copy or electronic copies of, all books, ledgers, accounts, records, data, and documents in the possession, custody, or control of the Defendant, relating to any matters contained in this Final Judgment; and

B. to interview, either informally or on the record, the Defendant's officers, employees, or agents, who may have their individual counsel present, regarding such matters. The interviews shall be subject to the reasonable convenience of the interviewee and without restraint or interference by the Defendant.

II. Upon the written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, MasterCard and/or Visa shall submit written reports or respond to written interrogatories, under oath if requested, relating to any of the matters contained in this Final Judgment as may be requested. Written reports authorized under this paragraph may, at the sole discretion of the United States, require a Defendant to conduct, at its cost, an independent audit or analysis relating to any of the matters contained in this Final Judgment.

III. No information or documents obtained by the means provided in this section shall be divulged by the United States to any person other than an authorized representative of (i) the executive branch of the United States or (ii) the Plaintiff States, except in the course of legal proceedings to which the United States is a party (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

IV. If at the time information or documents are furnished by a Defendant to the United States and the Plaintiff States, the Defendant represents and identifies in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure, and the Defendant marks each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure," then the United States and Plaintiff States shall give the Defendant ten (10) calendar days notice prior to divulging such material in any legal proceeding (other than a grand jury proceeding).

VII. Retention of Jurisdiction

This Court retains jurisdiction to enable any party to this Final Judgment to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions.

VIII. No Limitation on Government Rights

Nothing in this Final Judgment shall limit the right of the United States or of the Plaintiff States to investigate and bring actions to prevent or restrain violations of the antitrust laws concerning any Rule of MasterCard or Visa, including any current Rule and any Rule adopted in the future.

IX. Expiration of Final Judgment

Unless this Court grants an extension, this Final Judgment shall expire ten years from the date of its entry.

X. Public Interest Determination

Entry of this Final Judgment is in the public interest. The parties have complied with the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. 16, including making copies available to the public of this Final Judgment, the Competitive Impact Statement, and any comments thereon and the United States' responses to comments. Based upon the record before the Court, which includes the Competitive Impact Statement and any comments and response to comments filed with the Court, entry of this Final Judgment is in the public interest.

Court approval subject to procedures set forth in the Antitrust Procedures and Penalties Act, 15 U.S.C. 16.

Date: _____

United States District Judge

[FR Doc. 2010–25655 Filed 10–12–10; 8:45 am]

BILLING CODE 4410–11–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2010–0011]

Keystone Steel and Wire Company; Grant of a Permanent Variance

AGENCY: Occupational Safety and Health Administration (OSHA), Department of Labor.

ACTION: Notice of a grant of a permanent variance.