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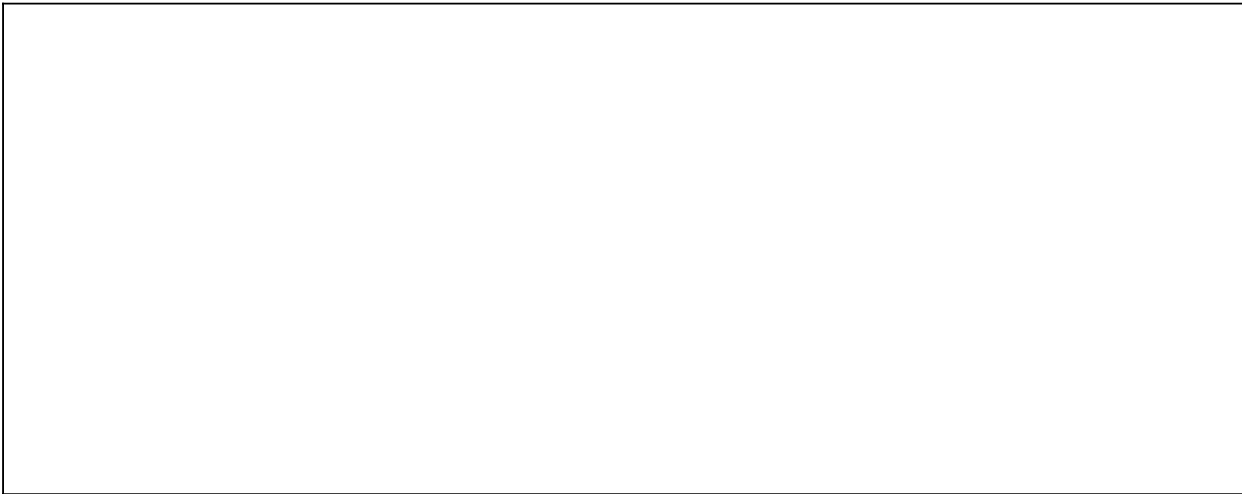

on the Visa and MasterCard networks are now permitted to issue cards on competing networks, such as American Express and Discover. According to an industry newsletter, the end of the "exclusionary rule" has led to eight banks acting as third party issuers of American Express branded cards in the U.S. in 2011, including Bank of America, Barclays, and Citigroup.[5] The 2011 purchase volume on these cards was $21 billion.[6] Further, at least four banks act as third party issuers of Discover branded credit cards, with a 2011 purchase volume of $14 billion.[7] This growth shows the increased competition among issuers as consumers chose among the various characteristics and variety of card products that have become

deal with merchants who want to set a minimum dollar value for accepting credit cards (as long as the minimum dollar value does not exceed $10). Fur
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approximately 70 percent of all signature debit cards in the U.S. carried the Visa brand, and virtually all Visa signature debit cards could be used to conduct PIN debit transactions. Cardholders could choose to use the card's PIN debit network(s) rather than Visa's signature debit network, indicating their preference by either entering their PIN or signing the receipt; the merchant would then route the payment transaction to the cardholder's bank using the network selected by the cardholder. Visa had for some time authorized banks to permit some types of merchants to waive the signature requi1.1 (ie19 (h)12.7 (ep52198bp (h).7 (ep5B)3 p)

and a base of cardholders. Defendants, having achieved these necessities early in the history of the industry, held substantial early-mover advantages over prospective subsequent entrants. Successful entry would be difficult, time consuming, and expensive.

20. Because the merchant restraints resulted in higher merchant costs, and merchants passed these costs on to consumers, retail prices were higher generally for consumers. Moreover, a customer who paid with lower-cost methods of payment paid more than he or she would if the defendants had not prevented merchants from encouraging network competition at the point of sale. For example, because certain General Purpose Cards that are more expensive for the merchant tend to be held by more affluent buyers, less affluent purchasers using other General Purpose Cards, debit cards, cash, and checks effectively subsidized part of the cost of the benefits of the more expensive cards and the rewards enjoyed by those cardholders.

21. The Complaint also alleged that the merchant restraints 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 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 made it more difficult for existing or potential competitors to threaten Defendants' market power.

22. The Division filed a proposed settlement simultaneously with its complaint requiring MasterCard and Visa to allow their merchants to offer consumers a discount or incentive for using a particular card network, express a preference and promote the use of a particular card network, and communicate to consumers the cost incurred by the merchant when a consumer uses a particular card network. The court approved the settlement on July 20, 2011.[18] Litigation with American Express is ongoing.

3. Update on Private Litigation in the United States

3.1 Kendall v. Visa U.S.A., Inc.

23.

proposed agreement "include[s] a cash payment and significant reforms of Visa and MasterCard rules and business practices."[20] The reforms of rules and business practices include modifications of network rules previously enforced by Visa and MasterCard relating to steering at the point-of-sale. The settlement agreement is currently before the court; several entities have expressed opposition to the settlement.[21]

4. Development of mobile payment systems

4.1 Technical developments and possible antitrust issues

25. The recent proliferation of smart phones and the development of technologies such as near field communications ("NFC") provide opportunities for consumers to use their smart phones rather than their credit or debit cards. The plans of those developing this technology appear to allow the incumbent credit card networks to continue to play a role in the payment ecosystem, except that mobile devices rather than plastic cards would be used for payment. However, because some new technologies like NFC permit two-way communication between a consumer's smart phone and a retailer's terminal, mobile payment systems may offer greater functionality to consumers and merchants.

26. Successful implementation of mobile payment systems is challenging because (1) it requires coordination across several complement providers (smart phones, enabled terminals, merchants, consumer accounts), and (2) network externalities heighten the importance of scale. In the United States, two sets of competitors have formed mobile payment joint ventures: (1) Isis, a joint venture including most of the major American mobile phone network providers: Verizon Wireless, AT&T, and T-Mobile,[22] and (2) Merchant Customer Exchange ("MCX"), a joint venture of many merchants that collectively represent approximately $1 trillion in annual sales. Members of MCX include Wal-Mart, Target, CVS, Sears, Lowe's, and Shell Oil. These joint ventures are not yet in operation.

27. Joint ventures that are collaborations between competitors may warrant antitrust scrutiny. The *Antitrust Guidelines for Collaborations Among Competitors* issued by the U.S. antitrust agencies in April 2000 describe the principles for evaluating agreements among competitors and the analytical framework for doing so.[23] Two broad categories of anticompetitive harm theories are (1) "exclusion" and (2) "overly inclusive joint venture." For exclusion, harm may arise if a joint venture denies some key element to rival systems and thereby reduces competition.[24] Whether this is a viable theory would depend on factors such as the freedom that the joint venture's members have to participate in multiple mobile payment systems

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20 *See* http://www.rkmc.com/Merchants-Reach-Landmark-$7.25-Billion-Settlement-with-Visa,-MasterCard-and-Major-U.S.-Banks-for-Alleged-Anticompetitive-Practices-and-Price-Fixing-In-Setting-Interchange-Fees.htm.

21 *See*, *e.g.*, *Merchants Say Proposed Swipe Fee Settlement Entrenches Visa/MasterCard Price Fixing,* http://www.nrf.com/modules.php?name=News&op=viewlive&sp_id=1428; *Wal-Mart Balks at $7 Billion Visa/MasterCard Settlement,* http://www.forbes.com/sites/danielfisher/2012/07/24/wal-mart-balks-at-7-billion-visamastercard-settlement/.

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(“multi-home”), the extent to which the members, individually or collectively, have market power with respect to the denied element, and the availability of adequate substitutes for that element. For the “overly inclusive joint venture” theory, harm may arise if a joint venture’s membership is so expansive, or its rules sufficiently restrictive, as to prevent the emergence or viability of a rival mobile payment system that might otherwise threaten the joint venture’s market power. Factors relevant to this analysis include the joint venture’s exclusivity, membership scope, whether current members would help form competing systems but for the overly inclusive nature of the joint venture, and if so, the impact of such participation on the timeliness, likelihood, and sufficiency of such entry.[25]

4.2 FTC consumer protection activities

30. In July 2012, the FTC's Bureau of Consumer Protection filed a comment with the Federal Communication Commission, stating that the "cramming" of unauthorized charges on wireless phone bills poses a serious problem for consumers and that wireless providers should be required to give customers the option to block all third-party charges from their bills.[32] The FTC continues to monitor mobile payment systems for concerns about these types of unauthorized charges.

31. The FTC also leads the U.S. delegation to the OECD Committee on Consumer Policy, which is doing extensive work on emerging online and mobile payment systems.

5. Innovation in the industry

32. There has been innovation in payment systems over the last few years, much of it focused on mobile payment technology. A recent report by the Consumer Research Section of the Federal Reserve Board's Division of Consumer and Community Affairs found that adoption of mobile payments in the United States has been slower than in many other countries, and that the primary reason that consumers resist using mobile payments is uncertainty regarding security. To address these opportunities and challenges, firms may focus innovation on two areas: (1) developing solutions for underserved consumer and merchant segments, and (2) improving transaction security.

33. Square is an example of a firm focusing innovation on underserved consumer and merchant segments. It has develou0.0016 (oS)14.3 (tlo)12.ents. ttee on Cpoc.5 dd[(3bw[(Squareal)7.8 (l692 h5d3iidd[(5ocu

35. Innovation is also occurring in products that facilitate the usage of debit and credit cards at merchants. Services such as Google Wallet and PayPal offer consumers and merchants an all-in-one payment processing solution. By accepting PayPal, a small merchant allows its customers to pay with any of the major credit card networks or alternately with a debit from a demand deposit bank account. For small merchants, this one-stop solution can be easier to implement than acceptance of each credit card brand. Such wallets also offer additional security and convenience to consumers for online transactions, by eliminating the need to enter one's credit card information on the merchant's website. In addition to its online solution, PayPal began to offer a point of sale payments service at the cash register for the U.S. and certain European markets in 2011. Buyers can access their PayPal accounts via a mobile phone number or a PayPal Access Card.

36. Entry barriers, however, remain significant in mobile payments. Recently, PayPal announced a partnership with Discover which will equip its more than 7 million merchants to accept PayPal as a payment method. By relying on the established merchant acceptance network of an incumbent general purpose card, PayPal was able to sidestep the formidable business and technical challenge of arranging acceptance directly at millions of brick and mortar establishments.

6. Conclusion

37. As predicted in the 2006 submission, the primary constant in the U.S. payment industry over the last several years has been change. While the advent of mobile payment technology offers the potential to significantly increase consumer choice even further, it is not yet clear how this technology will develop. While certain of the competition concerns articulated in the 2006 submission have disappeared, others remain, and yet others have arisen. We look forward to meeting the enforcement challenges posed by the continued evolution of this complex industry.