

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

ROUNDTABLE ON COMPETITION AND PAYMENT SYSTEMS

-- Note by the Delegation of the United States --

This note is submitted by the delegation of the United States to the Competition Committee FOR DISCUSSION under Item VI at its forthcoming meeting to be held on 24-25 October 2012.

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ROUNDTABLE ON COMPETITION AND PAYMENT SYSTEMS

-- Note by the United States --

1. The U.S. payment industry has evolved in several ways since the June 2006 Roundtable on Competition and Efficient Usage of Payment Cards. The use of payment cards continues to grow in the United States. Debit has grown particularly fast. In 2010, debit was estimated to comprise 21 percent of consumer payment purchase volume, up from 13 percent in 2005.¹ This growth in debit has come at the expense of checks and cash, which declined from 49 percent of consumer payment purchase volume in 2005 to 37 percent in 2010.² In addition, the card payment networks have restructured and some consumers are beginning to make payment-card transactions with their mobile phones. Finally, the U.S. regulatory framework governing the credit and debit industries was altered in 2010 as part of financial reform legislation.

2. During the past six years, the Antitrust Division of the U.S. Department of Justice ("Division") has focused on the anticompetitive effect of conduct that restricts merchants' ability to influence consumers' payment choices and thus obstructs competition. The Division also has reviewed and halted at least one combination that would have resulted in both unilateral and coordinated effects. The Federal Trade Commission ("FTC") has examined the effect of credit card disclosures on competition and has new authority to enforce regulations prohibiting network exclusivity arrangements and routing restrictions. The FTC also monitors U.S. payment systems for unfair or deceptive practices affecting consumers and brings law enforcement actions when necessary to stop consumer harm. As various modes of payment develop, it is important for consumers to understand the risks, benefits, and costs of alternative mechanisms so that they are in a position to choose the best method for them under their circumstances. To this end, it would be helpful to ensure that disclosures about alternative products are clear, and this may require testing along the lines of the FTC's work on mortgage disclosures.³ Private plaintiffs continue to litigate cases based on allegations of price-fixing of interchange fees and on anti-steering rules.

1. Structural Changes to the U.S. Payment Industry

1.1 Restrictions on the Issuance of Competing Cards

3. As a result of the Division's 1998 challenge to the Visa and MasterCard joint ventures, described in paras. 11-16 of the U.S. submission to the 2006 Roundtable ("2006 submission"),⁴ banks that issue cards

¹ Nilson Report, Dec 2011 (Issue 985).

² *Id.*

³ See Lacko, J. and Pappalardo, J., "The Failure and Promise of Mandated Consumer Mortgage Disclosures: Evidence from Qualitative Interviews and a Controlled Experiment with Mortgage Borrowers," American Economic Review, May 2010.

⁴ [DAF/COMP/WP2/WD\(2006\)39](#). The Division alleged that the adoption of rules and policies that disadvantaged or excluded rival general purpose card networks, such as American Express and Discover/Novus, including rules or policies prohibiting member banks from issuing cards on the American Express or Discover/Novus networks, constituted a continuing combination and conspiracy to organize and

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 available.

1.2 Dual Governance

4. While the Division did not prevail in its challenge in *Visa* to the joint ventures’ “dual governance” system, changes the associations subsequently made to their corporate structures have alleviated this concern. At the time of the 2006 submission, dual governance permitted the election or appointment of bank member governors of their associations that had material portions of their card portfolios on both the Visa and MasterCard networks, thereby reducing incentives for the two jointly-owned systems to compete vigorously in brand and product development.⁸ In 1998, the Division alleged this arrangement constituted a conspiracy in restraint of trade,⁹ although this allegation was not upheld in court. The dual governance system is no longer in effect, however, because in 2006,

*MasterCard became a publicly traded company with a board of directors with a majority of directors that are independent from their financial institution customers. Visa became a publicly traded company in 2008, and its financial institution members became common stockholders with a minority of shares.*¹⁰

5. These changes in corporate structure reduced the ability of issuers and acquirers to negatively affect Visa’s and Mastercard’s competitive decisions.

1.3 Changes in the U.S. Regulatory Framework

6. As part of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank”),¹¹ Congress created important new legal obligations for the credit and debit card industries. The so-called “Durbin Amendment” to Dodd-Frank prohibits payment card networks from barring merchants from offering discounts or in-kind incentives to consumers for using a particular payment method, such as cash, checks, debit cards, or credit cards. These rules also forbid payment card networks from ceasing to

operate general purpose card networks in a manner that restrained competition among general purpose card networks in violation of Section 1 of the Sherman Act. The court agreed, holding that the rules were unreasonably anticompetitive. *See U.S. v. Visa USA, Inc.*, 163 F. Supp. 3d 322 (S.D.N.Y. 2001), *aff’d* 344 F.3d 229 (2d Cir. 2003).

⁵ Nilson Reports, Jan 2012 (Issue 987), “American Express Results – U.S.”

⁶ *Id.*

⁷ Nilson Reports, Jan 2012 (Issue 986), “Discover Financial Services.”

⁸ *See U.S. v. Visa USA Inc., et al*, Complaint (Oct. 7, 1998) ¶¶ 40 - 100, available at: <http://www.justice.gov/atr/cases/f1900/1973.htm>.

⁹ *Id.*, at ¶¶ 155 – 158.

¹⁰ General Accountability Office, *Credit Cards: Rising Interchange Fees Have Increased Costs for Merchants, but Options for Reducing Fees Pose Challenges*, GAO-10-45 (November 2009), 3-4.

¹¹ Pub. L. 111-203.

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).

7. Further, Dodd-Frank introduced three changes to the debit card market. First, the Board of Governors of the U.S. Federal Reserve (“Federal Reserve”) was granted the authority to cap debit interchange fees. The Federal Reserve subsequently promulgated a final rule capping these fees at 21 cents per transaction, plus an ad valorem upward adjustment for certified fraud-prevention programs. Second, Dodd-Frank and its implementing regulations require issuing banks and payment networks to allow merchants to choose between two or more competing debit networks to process transactions made with their cards. Finally, the rules prohibit issuers and payment networks from inhibiting merchants’ ability to select the debit network that processes their transactions.

8. Overall, these rules are designed to increase competition among debit networks. Previously, debit networks competed for issuing banks primarily by offering exclusive agreements and high interchange fees. With the requirement of multiple debit options, debit networks now also compete for merchants’ debit transaction volume. Together with the cap on debit fees, this competition should work to discipline debit merchant fees.

9. Another legislative proposal that has not been adopted would seek to increase the bargaining power of merchants in their negotiation of interchange fees and terms of access to credit and/or debit card networks by creating broad antitrust immunity for merchants in their negotiations with the networks and the issuing banks. One version of this proposal¹² also provides that if the joint negotiations between banks and merchants do not produce an agreement on interchange rates and related terms, the member merchants and banks would be subject to an administrative procedure before a three-judge panel to determine the rates and terms for a three-year period.

10. The U.S. Department of Justice and FTC commented separately to Congress on this legislative proposal in June 2008.¹³ Both agencies expressed general opposition to the creation of sector-specific exemptions from the antitrust laws, and noted that the regulatory function of setting prices was alien to their mission and experience in enforcing the antitrust laws. The Department also commented on the complexity of regulating fees in two-sided markets, the risks of market power created by the proposed joint negotiations, and the perils of price-control legislation.

2. Division Enforcement Activity in the Payments Sector

2.1 Visa Debit Card Rule

11. In response to a Division investigation, Visa Inc. in 2008 rescinded a rule that required merchants to treat Visa-branded debit cards differently when used as PIN-debit cards (and processed via non-Visa networks) from those same cards when used as signature debit cards and processed on the Visa network.

12. The Division had been investigating whether this Visa rule adversely affected competition by restricting certain PIN debit transactions, particularly the small-value and Internet ones, and by interfering with the introduction of new types of PIN debit services. The Division’s investigation revealed that

¹² H.R. 5546, the Credit Card Fair Fee Act of 2008.

¹³ Letter from Keith B. Nelson, Principal Deputy Assistant Attorney Gen., U.S. Dep’t of Justice, to the Hon. Lamar Smith, Ranking Member, Committee on the Judiciary, U.S. House of Representatives (June 23, 2008); letter from William E. Kovacic, Chairman, Federal Trade Commission, to the Hon. Lamar Smith, Ranking Member, Committee on the Judiciary, U.S. House of Representatives (June 19, 2008) (both providing the respective agency’s views on H.R. 5546, the “Credit Card Fair Fee Act of 2008”).

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 requirement for certain signature debit transactions (those below \$25 and certain transactions initiated over the Internet). This action accounted for significant growth in debit card use, benefitted merchants and consumers, and encouraged adoption of contactless readers, a new technology at the point of sale. In contrast, the Visa regulation investigated by the Division permitted signature waiver, but prohibited banks from allowing merchants to waive entry of a PIN for most non-Visa transactions initiated from a Visa-branded debit card, including below-\$25 and almost all Internet transactions, potentially raising barriers to entry for new types of PIN debit services. Visa's rescission of the rule alleviated the Division's concern.

2.2 Verifone/Hypercom

13. In 2011, the Division challenged the acquisition of Hypercom Corp. ("Hypercom") by Verifone Systems Inc. ("Verifone"), two of only three significant sellers of point-of-sale (POS) terminals in the United States.¹⁴ The complaint alleged that the proposed transaction would eliminate important competition in the sale of POS terminals in the United States and likely result in both unilateral and coordinated effects. POS terminals are used by retailers and other firms to accept electronic payments such as credit and debit cards.

14. The Division's investigation revealed two distinct markets for POS terminals. The first market consists of countertop POS terminals, which are directly connected to credit card processors through a telephone line, internet connection or cellular network. Post-transaction, the combined company would have controlled approximately 60 percent of the countertop POS terminals market. The second market consists of multi-lane POS terminals, which are integrated into a merchant's cash register and integrated POS system. After the transaction, the top three players in this market for multi-lane POS terminals – Hypercom, Verifone and Ingenico – would have had a combined 90 percent market share. The complaint asserted that the acquisition

*would likely result in unilateral effects in each relevant market as VeriFone would be able to raise the price of both VeriFone and Hypercom products because it would recapture some sales that would have been lost absent the acquisition as purchasers reacted to such price increases by switching between VeriFone and Hypercom products. The elimination of Hypercom as a competitor would also reduce the number of significant competitors from three to two in the POS terminals markets, resulting in a duopoly and heightening the potential for coordinated behavior. Coordination, whether tacit or explicit, is especially likely because the acquisition would enhance each company's ability to deter competitive behavior in one market by retaliating across a range of other product and geographic markets.*¹⁵

¹⁴ U.S. v. Verifone Systems Inc., et al., Complaint (May 12, 2011); available at <http://www.justice.gov/atr/cases/verifone.html> for case filings. Shortly after executing the merger agreement, Hypercom entered into a licensing agreement pursuant to which it would license its POS business to Ingenico, S.A., the only substantial provider of POS terminals. The Division also challenged this agreement, but dropped the challenge when the parties abandoned the proposed licensing deal. The Verifone/Hypercom transaction was also reviewed by Spain's National Competition Council (see <http://www.cncompetencia.es/Inicio/Noticias/tabid/105/Default.aspx?Contentid=441972&Pag=10>) and by the UK's Office of Fair Trading (see <http://www.oft.gov.uk/OFTwork/mergers/decisions/2011/hypercom>).

¹⁵ U.S. v. Verifone Systems, Inc., and Hyperion Corporation, Competitive Impact Statement at 7, available at <http://www.justice.gov/atr/cases/f273600/273617.pdf>.

15. The high barriers to entry in both markets made entry unlikely to alleviate any of the anticompetitive effects.

16. After the Division's complaint was filed, VeriFone and Hypercom entered into settlement negotiations with the Division to find an alternative buyer. The Division filed a proposed settlement on August 4, 2011. The settlement required Verifone to divest Hypercom's U.S. POS terminals business to an entity sponsored by Gores Group LLC ("Gores"), a private equity fund. This divestiture would include physical assets, personnel, intellectual property rights, transitional support, and all other assets necessary for Gores to become a viable competitor in the industry. The final judgment was issued by the district court on November 21, 2011.

2.3 *United States v. American Express Company*

17. In *U.S. v. American Express Company*,¹⁶ the Division challenged the so-called "anti-steering" rules that American Express, MasterCard, and Visa had in place that prevented merchants from offering, at the point of sale, consumer discounts, rewards, or information about card costs, or from expressing a preference for a card brand that is less expensive for the merchant ("merchant restraints"). According to the complaint, filed on October 4, 2010 ("Complaint"), these rules prohibited merchants from encouraging consumers to use lower-cost payment methods, resulting in an increase in the merchants' cost of doing business, and ultimately forcing consumers to pay more for their purchases. The challenged merchant restraints deterred or obstructed merchants from freely promoting inter-brand 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.

18. The merchant restraints blocked 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.¹⁷

19. The Complaint alleged two distinct relevant product markets: the market for General Purpose Card network services to merchants, and within that broader market, a price discrimination market -- the market for General Purpose Card network services to travel and entertainment merchants ("T&E market"). In each case, the relevant geographic market was the United States. The Complaint alleged that each of the defendants possessed market power in both relevant product markets. Finally, significant barriers to entry and expansion protected defendants' market power, and contributed to their 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 included the prohibitive cost of establishing a physical network over which General Purpose Card transactions could run, developing a widely recognized brand, and establishing a base of merchants

¹⁶ See <http://www.justice.gov/atr/cases/americanexpress.html> for case filings.

¹⁷ Federal law mandates that networks permit merchants to offer discounts for cash transactions. Additionally, Dodd-Frank, by adding section 920 to the Electronic Fund Transfer Act, 15 U.S.C. § 1693 *et seq.*, forbids networks from prohibiting merchants from offering a discount or in-kind incentive for payment by the use of cash, checks, debit cards, or another payment method. This would include, for example, offering a discount for the use of any debit card. All General Purpose Card networks operate under these laws, and the Complaint did not seek relief relating to these two types of discounting.

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. In *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042 (9th Cir. 2008), a group of merchants sued Visa, MasterCard, and several banks, alleging that they violated Section 1 of the Sherman Act by conspiring to set the merchant discount and interchange fees charged to merchants for payment of credit card sales. The trial court dismissed the complaint, and was upheld on appeal. The Court of Appeals held that the merchants had failed to plead any evidentiary facts beyond parallel conduct with respect to the banks, and as indirect purchasers were barred from recovery against the credit card networks.

3.2 *Merchant Class Action Litigation*

24. The 2006 submission in para. 28 described the class action antitrust complaint merchants and other industry participants brought against Visa and MasterCard in 2005.¹⁹ A putative class of approximately seven million U.S. merchants who accept Visa and MasterCard credit and debit cards sued the two networks and a group of card-issuing banks, including JPMorgan Chase, Bank of America, Citibank, Wells Fargo, Capital One, and others. The complaint alleged that Visa's and MasterCard's anti-steering rules (imposed on merchants) reduced competition and kept prices high. The complaint also alleged price-fixing in the setting of interchange fees. On July 13, 2012, the parties announced they had signed a memorandum of understanding to enter into a settlement agreement to resolve the claims. This

¹⁸ The final judgment is available at <http://www.justice.gov/atr/cases/f273100/273170.htm>.

¹⁹ *In re Payment Card Interchange Fee and Merchant Discount Litigation*, 05-MD-1720 (JG)(JO)(E.D. NY).

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

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](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/>.

²² Sprint, the other large mobile phone network, has partnered with Google to deploy the Google Wallet solution on some Samsung smart phones that are available to Sprint subscribers. A March 21, 2012 Bloomberg.com report suggests that, due to slow adoption, Google may be considering sharing revenues with Verizon Wireless and AT&T in order to get these carriers to embrace the Google Wallet.

²³ U.S. Department of Justice & Federal Trade Commission, *Antitrust Guidelines for Collaborations Among Competitors* (Apr. 2000), reprinted in 4 Trade Reg. Rep. (CCH) para. 13,161 (Apr. 12, 2000), available at <http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf>.

²⁴ *Id.* at sec. 3.34 (Factors Relevant to the Ability and Incentive of the Participants and the Collaboration to Compete).

(“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*

28. Since 2000, the FTC’s Bureau of Consumer Protection has actively examined consumer issues in mobile payment services. Among other things, the Commission’s workshops have focused on the applications and implications of Radio Frequency Identification (“RFID”) technology,²⁶ the role of mobile technology in commerce,²⁷ the emergence of contactless payment systems,²⁸ and advertising and privacy disclosures in mobile environments.²⁹ Mobile payments frequently involve hardware manufacturers, operating system developers, application developers, data brokers, coupon and loyalty program administrators, payment card networks, advertising companies, brands, and end-merchants. The FTC has jurisdiction over all of these entities as well as telecommunications providers when they are not engaged in common carrier activities.³⁰

29. On April 26, 2012, the FTC’s Bureau of Consumer Protection convened a workshop on the development of mobile payments and their impact on consumers.³¹ The workshop looked at innovative products and services being developed and the potential changes coming for consumers and merchants. For consumers, mobile payments can be an easy and convenient way to pay for goods and services, get discounts through mobile coupons, and earn or use loyalty points. Mobile payments also may provide under-served communities with greater access to alternative payment systems. The workshop examined three primary areas where consumer concerns are likely to arise with the increasing use of mobile payments: dispute resolution, data security, and privacy. Given the potential concerns raised, the agency will continue to monitor mobile payment developments to ensure consumers are adequately protected.

²⁵ *Id.* at sec. 3.33 (Market Shares and Market Concentration), “The creation, increase, or facilitation of market power will likely increase the ability and incentive profitably to raise price above or reduce output, quality, service, or innovation below what likely would prevail in the absence of the relevant agreement.”; and sec. 3.35 (Entry).

²⁶ See FTC Workshop, *Radio Frequency Identification: Applications and Implications for Consumers* (June 21, 2004), available at <http://www.ftc.gov/bcp/workshops/rfid/index.shtml>; FTC Workshop, *Transatlantic RFID Workshop on Consumer Privacy and Data Security* (Sep. 23, 2008), available at <http://ftc.gov/bcp/workshops/transatlantic/index.shtml>.

²⁷ See FTC Workshop, *Protecting Consumers in the Next Tech-ade* (Nov. 6-7, 2006), available at <http://www.ftc.gov/bcp/workshops/techade/what.html>.

²⁸ See FTC Workshop, *Pay on the Go: Consumers & Contactless Payment* (July 24, 2008), available at <http://www.ftc.gov/bcp/workshops/payonthego/index.shtml>.

²⁹ See FTC Workshop, *In Short: Advertising and Privacy Disclosures in a Digital World* (May 30, 2012), available at <http://www.ftc.gov/bcp/workshops/inshort/index.shtml>.

³⁰ The FTC’s jurisdiction reaches any person, partnership or corporation that affects commerce, except for limited exclusions such as depository institutions. See 15 U.S.C. § 45(a)(2).

³¹ See FTC Workshop, *Paper, Plastic . . . or Mobile? An FTC Workshop on Mobile Payments* (April 26, 2012), available at <http://www.ftc.gov/bcp/workshops/mobilepayments/>. FTC staff is currently preparing a report based on the workshop’s findings.

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 developed a payment card reader that can be attached to a mobile phone or tablet computer and has enrolled many small merchants for whom investing in a traditional payment card terminal is not fiscally prudent. Visa, which has invested in Square, claims that Square does not compete with Visa products, but "helps to drive acceptance of payment cards in a segment that has been historically underserved."³³ The Starbucks Coffee Company recently formed a partnership with Square to employ its mobile technology in U.S. Starbucks stores.³⁴

34. In regard to innovation in the second category -- transaction security -- there are a number of existing innovations responding to consumers' concern, as well as new ideas under development. These include secure elements that are embedded in mobile phones, secure elements that reside on SIM cards, and solutions in which a virtual secure element is stored in the cloud. Absent a sufficient variety of "secure element" solutions, control of the secure element(s) may create market power and reduce competition in mobile payment technologies. For example, if the only viable technologies are secure elements that are controlled by the mobile network operator (MNO), then MNOs may seek to exercise market power by collecting substantial transaction fees on all mobile payments. This could reduce the benefits from mobile payment technology available to merchants and to consumers. However, if alternative security solutions exist that do not require access granted by the MNO, then the owner/controller of any given secure element may be unable to exercise market power in this manner. Greater numbers of merchants and consumers might then adopt mobile payment technology more rapidly. Benefits include increased convenience and better-targeted promotions for consumers, and potentially lower transaction fees and more effective promotions for retailers.

³² See FTC Reply Comment Before the federal Communications Commission Concerning Placement of Unauthorized Charges on Wireless Bills, Otherwise Known as "Cramming," CG Docket Nos. 11-116, 09-158 and 98-170 (July 2012), available at <http://www.ftc.gov/opa/2012/07/cramming.shtm>.

³³ Claire Caine Miller, "Visa Invests in Square for Mobile Payments," The New York Times, April 27, 2011, <http://bits.blogs.nytimes.com/2011/04/27/visa-invests-in-square-for-mobile-payments/>.

³⁴ Claire Caine Miller, "Starbucks and Square Team Up," The New York Times, August 8, 2012, http://www.nytimes.com/2012/08/08/technology/starbucks-and-square-to-team-up.html?_r=1.

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.