

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,)	No. 10 Civ. 4496 (NGG)(CLP)
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.)	

TO: John R. Read
Chief, Litigation III Section
Antitrust Division
United States Department of Justice
450 Fifth Street, NW, Suite 4000
Washington, DC 20530

**COMMENTS OF RETAIL INDUSTRY LEADERS ASSOCIATION
CONCERNING PROPOSED FINAL JUDGMENT AS TO DEFENDANTS
MASTERCARD INTERNATIONAL INCORPORATED AND VISA INC.**

TABLE OF CONTENTS

I.	PRELIMINARY STATEMENT	1
II.	FACTUAL BACKGROUND.....	5
	A. Retail Industry Leaders Association	5
	B. Premium or “Rewards” Credit Cards.....	5
	1. There Are More Than 500 Million Visa and MasterCard Credit Cards in the U.S.	6
	2. Rewards Cards Account for the Vast Majority of Credit Card Transactions	6
	3. Rewards Cards Are Universally More Expensive for Merchants.....	7
	4. Payment Networks Reconfigured Standard General Purpose Cards As Rewards Cards	8
	C. Rewards Cards Under the Proposed Judgment.....	9
III.	JUDICIAL REVIEW UNDER THE TUNNEY ACT	10
IV.	MERCHANTS SHOULD BE ABLE TO IMMEDIATELY DISTINGUISH BETWEEN CARD TYPES FOR THE SETTLEMENT TO BE EFFECTIVE	12
	A. Merchants Need to Distinguish Between Types of Cards for the Settlement to Be Effective	13
	B. Uniform Identifiers Will Ensure That the Settlement Is Effective	14
	1. Identification Provision.....	14
	2. Identification of Card Types Will Reduce Ambiguity and Make the Decree More Effective and Enforceable	17
	C. Clarifications to Section IV.B.....	18
V.	CONCLUSION.....	18

I. PRELIMINARY STATEMENT

The Retail Industry Leaders Association (“RILA”) applauds the Antitrust Division’s longstanding interest in the General Purpose Card network services market and, in particular, its dedicated effort to inject network price competition for merchants into this market. As such, RILA welcomes the settlement reached by Plaintiffs and MasterCard International Incorporated and Visa Inc. as it could help facilitate competition in the General Purpose Card market, particularly price competition that could benefit merchants and consumers. We provide these comments in the hope that they will be taken into account to give merchants a more meaningful ability to take advantage of the Final Judgment.¹

From the merchant perspective, the most important aspect of the Final Judgment is that it will eliminate rules that prevent merchants from providing consumers information and price signals (via discounting) that could steer consumers toward choosing lower-cost payment options. Such steering could conceivably be most beneficial with respect to Visa and MasterCard premium and rewards cards that are substantially more expensive for merchants (and their customers) than traditional (*i.e.*, non-rewards) Visa and MasterCard credit cards. While the Final Judgment empowers merchants to steer between Types of General Purpose Cards — defined as “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’)” — to encourage consumers to use cheaper forms of payment, RILA strongly recommends that this Court

¹ References to the Final Judgment refer to the [Proposed] Final Judgment As To Defendants MasterCard International Incorporated and Visa Inc., which was filed on October 4, 2010. References to defined terms from the Final Judgment will be capitalized consistent with their treatment in the Final Judgment.

consider whether a supporting and clarifying provision is needed to provide merchants a meaningful ability to take advantage of the decree and to make it effective, enforceable, and unambiguous.

Specifically, to steer cardholders from expensive Visa and MasterCard credit cards to cheaper forms of payments — such as, as the decree sets forth in several places, by “an immediate discount or rebate at the point of sale” — merchants need to know which type of cards they are receiving at the point of sale. And they need the ability to identify and attempt to steer those cards quickly, as processing payments efficiently at the point of sale is critically important both to merchants and their customers.

The problem is that currently there are hundreds of millions of Visa and MasterCard General Purpose Cards issued by dozens of different banks, most of which do not have consistent branding. The Types of Visa and MasterCard General Purpose Cards, including “rewards cards,” which are more expensive for merchants to accept often bear no visible indicia on the front of the card that would indicate to a sales clerk that they bear higher fees for merchants. Given that backdrop, to give merchants a meaningful ability to steer cardholders to cheaper forms of payment, merchants should have a consistent means of identifying the various Types of Visa and MasterCard General Purpose Cards at the point of sale. This could be accomplished by modifying or clarifying the decree to require Visa and MasterCard to provide clear, uniform electronic and visual identifiers which would allow merchants and consumers to effectively identify the various Types of Visa and MasterCard General Purpose Cards, such as rewards cards. The decree could require Visa and MasterCard to adopt rules requiring a unique electronic code and visual identifier for each Type or other category of General Purpose

Card whose use in a transaction results in a merchant being charged an interchange rate that is different from any interchange rate that would be charged for an otherwise identical transaction if another Type or category of Visa General Purpose Card was used.

These changes could be easily implemented by Visa and MasterCard and the issuing banks without much, if any, burden. Both Visa and MasterCard have long dictated certain design and “branding” features of all Visa and MasterCard General Purpose Cards through their rules. Those rules could be amended to require a consistent branding for all Types of Visa and MasterCard General Purpose Cards that qualify for distinct interchange tiers based on the Type of General Purpose Card to render them distinguishable to merchants and consumers from other Visa or MasterCard General Purpose Cards. Moreover, issuers could comply with this new rule within the ordinary reissuance cycle and, thus, the change would not impose any burden on them.

As for electronic means of identifying Types of Visa and MasterCard General Purpose Cards, that could be achieved by requiring Visa and MasterCard to create (if they have not done so already) a unique identification code for Types of Visa and MasterCard General Purpose Cards that qualify for distinct interchange tiers based on the Type of General Purpose Card and make that information available to merchants, at no cost. That requirement also would not impose any burden on Visa and MasterCard as they almost certainly maintain such electronic information through, for example, their “product code identifiers” that currently differentiate between Types or categories of General Purpose Cards.

Given the differences between merchants, it is important that both visual and electronic means of identification be made available to maximize their ability to take

advantage of the Final Judgment. Some merchants might implement electronic solutions to target more expensive Types of cards, whereas less technically proficient merchants might identify the cards visually. Having both means available ensures that the widest universe of merchants can take advantage of the Final Judgment.

Notably, Visa and MasterCard have agreed to these kinds of requirements before. In 2003, as part of a settlement of an antitrust lawsuit brought by a class of merchants against the alleged tying of credit and debit acceptance, Visa and MasterCard agreed to require that thousands of debit issuers reissue their debit cards during the normal reissuance cycle with a “Debit” identifier on the front of the card.² As the court that approved the settlement noted, in order to give merchants a meaningful ability to accept credit cards but not debit cards, and vice versa, that settlement called for “the creation of clear, conspicuous and uniform visual identifiers on Visa and MasterCard debit cards . . . so merchants and consumers can distinguish these products from credit cards.” *In re Visa Check/MasterMoney Antitrust Litig.*, 297 F. Supp. 2d 503, 508 (E.D.N.Y. 2003) (“Illustrations of these new identifiers on Visa and MasterCard debit cards are attached to this memorandum as appendices on pages [527] through [530].”), *aff’d sub nom. Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 103 (2d Cir. 2005) (citing “the creation of clear, conspicuous and uniform visual identifiers on Visa and MasterCard debit cards”), *cert. denied sub nom. Leonardo’s Pizza by the Slice, Inc. v. Wal-Mart Stores, Inc.*, 544 U.S. 1044 (2005). Debit issuers complied with that requirement within the normal reissuance cycle by reissuing debit cards with the requisite debit identifier over a mandated three-year period. That settlement also required Visa and MasterCard to

² Most banks reissue all of their payment cards every three years due to wear and tear on the magnetic stripe.

make available certain electronic means of distinguishing between the cards. The rationale for requiring visual and electronic identifiers was the same rationale that RILA advocates here: that without the ability to efficiently tell the difference, either visually or electronically, between the cards at the point of sale, merchants could not realize the full potential of the settlement. Accordingly, RILA believes that similar amendments or clarifications to the Final Judgment are extremely important to realize the full potential value of the settlement.

II. FACTUAL BACKGROUND

A. Retail Industry Leaders Association

The Retail Industry Leaders Association (“RILA”) is an alliance of the world’s most successful and innovative retailer and supplier companies — the leaders of the retail industry. RILA counts nine of the top ten U.S. retailers as members. RILA members also hold the top spot among key retail segments including: apparel, consumer electronics, department stores, home improvement, large format and small format. RILA members represent almost \$1.4 trillion in sales annually and operate more than 100,000 stores, manufacturing facilities and distribution centers nationwide. RILA member retailers and suppliers have facilities in all 50 states, as well as internationally, and employ millions of workers domestically and worldwide.

B. Premium or “Rewards” Credit Cards

As detailed below, there are millions of Visa and MasterCard General Purpose Cards issued by dozens of banks in the U.S. Many of these cards have been reissued or reclassified in recent years as “rewards” cards. Of the millions of General Purpose Cards that may be presented to merchants, Visa and MasterCard each maintain several Types

which incur different interchange rates — the fees merchants are forced to pay for all Visa and MasterCard transactions.³ All premium or rewards cards incur higher interchange fees. Unfortunately, there is no uniform way for merchants to identify Types of Visa and MasterCard rewards General Purpose Cards, and from the merchant's (or consumer's) perspective, many are indistinguishable from non-rewards General Purpose Cards.

1. There Are More Than 500 Million Visa and MasterCard Credit Cards in the U.S.

According to the Census Bureau, there are some 563 million Visa and MasterCard credit cards in circulation.⁴ In the first half of 2010 alone, Visa and MasterCard credit cards accounted for \$616.7 billion dollars in purchases and 7.28 billion purchase transactions in the U.S. The Nilson Report, Issue No. 955 at 7 (Aug. 2010). In 2009, card manufacturers worldwide produced and shipped 2.75 billion credit, debit, and prepaid cards bearing the Visa or MasterCard logo. The Nilson Report, Issue No. 959 at 9 (Oct. 2010).

2. Rewards Cards Account for the Vast Majority of Credit Card Transactions

Rewards cards are widespread, and they account for the vast majority of credit cards transactions in the U.S. Half of all consumers belong to at least one General Purpose Card rewards program and, of consumers with one credit card, 70 percent have a

³ See Fumiko Hayashi, *Do U.S. Consumers Really Benefit from Payment Card Rewards*, Federal Reserve Bank of Kansas City, Economic Review 43 (1st Qtr. 2009), <http://www.kansascityfed.org/Publicat/ECONREV/PDF/09q1Hayashi.pdf>; see also, e.g., Visa U.S.A. Interchange Reimbursement Fees at 3 (Oct. 2010) (setting forth four different interchange rate categories across fee programs), <http://usa.visa.com/download/merchants/october-2010-visa-usa-interchange-rate-sheet.pdf>.

⁴ U.S. Census Bureau, *Statistical Abstract of the United States: 2010*, Section 25 Tbl. 1151, available at <http://www.census.gov/prod/2009pubs/10statab/banking.pdf> (citing The Nilson Report).

rewards card.⁵ A December 2009 study by Aite Group projected that rewards cards will make up two-thirds of all cards by 2013. Aite Group Study at 3.

In 2001, rewards cards accounted for about one in five general purpose credit cards issued in the U.S. Today, they account for six in ten cards in force. Aite Group Study at 9. The percentage of transactions and dollars charged on rewards cards is even higher — in 2009, rewards cards accounted for 60% of credit cards, but accounted for 84% of spending and 85% of transaction volume. *Id.* at 10, Fig. 9.

3. Rewards Cards Are Universally More Expensive for Merchants

While there are numerous General Purpose Cards and rewards programs, merchants pay substantially higher fees to issuers for virtually all of them — as much as 180 basis points higher.⁶ Importantly, these higher Visa and MasterCard interchange tiers have been applied to rewards cards regardless of whether they are branded or identified in any way that denotes them as rewards cards. Thus, in many cases, merchants have no way of knowing they are receiving these high-cost cards.

⁵ See Aite Group, *Financial Services Rewards Programs: The Quest for Profitability* at 3, 5 (Dec. 2009); Hayashi, *Do U.S. Consumers Really Benefit from Payment Card Rewards*, Federal Reserve Bank of Kansas City, Economic Review 39 (noting that estimates vary and citing Visa study that “70 percent of consumers with at least one general purpose credit card have a rewards credit card”).

⁶ See The Nilson Report, Issue 958 at 7 (noting that on an average credit card transaction of \$85, the costliest Visa cards incur \$1.52 more in interchange than the cheapest card, or 180 basis points); Andrew Ching & Fumiko Hayashi, *Payment Card Rewards Programs and Consumer Payment Choice*, Payments System Research, Federal Reserve Bank of Kansas City, Working Paper 06-02 at 3 n.5 (July 18, 2006), http://www.kansascityfed.org/PUBLICAT/PSR/RWP/Ching_Hayashi_Paper.pdf (noting that “Visa and MasterCard introduced new interchange rate schemes in 2005” and that “[i]nterchange rates of reward credit cards (such as Visa’s Signature Card and MasterCard’s World Card) are higher than those of non-reward credit cards” by as much as 80 basis points); Hayashi, *Do U.S. Consumers Really Benefit from Payment Card Rewards?*, Federal Reserve Bank of Kansas City, Economic Review at 43-44 (First Quarter 2009) (“Regardless of their transaction volume, merchants consistently pay higher interchange fees for cards with more generous rewards.”).

4. Payment Networks Reconfigured Standard General Purpose Cards As Rewards Cards

In the late 1990s, Visa and MasterCard introduced so-called premium General Purpose Cards — the Visa Signature Card and the World MasterCard — which qualified for higher interchange rates than those that applied to standard General Purpose Cards. They subsequently added “rewards” interchange tiers (Visa) and an enhanced tier (MasterCard) that similarly qualified for higher rates than standard General Purpose Cards. Eventually Visa added Signature Preferred and MasterCard added World Elite tiers, also at higher rates. Before the networks introduced these new, more expensive categories, neither Visa’s nor and MasterCard’s interchange tiers distinguished between Types of General Purpose Cards.

Under network rules, issuers are permitted to reconfigure payment cards from non-rewards to rewards General Purpose Cards without changing the design or branding of the card and without even reissuing the card. After 2005, many Visa and MasterCard General Purpose Cards were reclassified for interchange purposes as premium or rewards cards, immediately making transactions made with these cards more expensive to the merchant even though the changes to the cards were not visible to the merchant. In this regard, issuers can use the product code identifiers that were implemented by Visa and MasterCard in recent years to change (and increase) the interchange tiers applicable to the card without reissuing it and making the change transparent to merchants. Merchants, nonetheless, had no choice but to accept these higher-priced cards because Visa and MasterCard have substantial market power over them. At the same time, Visa and MasterCard network rules barred merchants from discriminating between Types of Visa and MasterCard General Purpose Cards and, in particular, against rewards cards.

C. Rewards Cards Under the Proposed Judgment

Current Visa and MasterCard anti-steering rules prohibit merchants from discriminating against Types of Visa and MasterCard General Purpose Cards, such as rewards cards, in favor of cheaper Visa and MasterCard General Purpose Cards, or other cheaper forms of payment. The proposed settlement will allow merchants a range of methods, such as discounting, to steer customers away from expensive rewards General Purpose Cards to cheaper forms of payment.⁷

Merchant behaviors which can no longer be prohibited are set forth in Section IV.A of the Final Judgment.⁸ This section prevents MasterCard and Visa from restraining merchants from, among other things, offering discounts, rebates or other benefits based on Type of General Purpose Cards — that is, rewards or non-rewards. Final Judgment § IV.A at 6.⁹ “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 . . . 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)” Competitive Impact Statement at 11.

⁷ Among other benefits outlined in the Competitive Impact Statement, merchants will be able to offer lower prices to counteract the fact that “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 . . . effectively subsidize part of the cost of expensive premium card benefits and rewards enjoyed by those cardholders.” Competitive Impact Statement at 9.

⁸ Visa and MasterCard will still be able to prohibit merchants from discriminating between particular issuers. Final Judgment § IV.B. Presumably, this provision will not inhibit the rights of merchants to discriminate based upon *type* of payment card.

⁹ Under Section I.16 of the proposed Final Judgment, “‘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’).” Final Judgment at 4.

Several provisions of the proposed Final Judgment also acknowledge that merchants must now be permitted to offer “an immediate discount or rebate at the point of sale.” Final Judgment § IV.1, § V.B, § V.C; *see* Complaint ¶ 3 (“In short, Defendants’ Merchant Restraints prohibit merchants from fostering competition among credit card networks *at the point of sale.*”) (emphasis added).

The Final Judgment also provides that Visa and MasterCard must not restrict “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.” Final Judgment § IV.D (emphasis added). This provision is intended to give merchants information “[t]o facilitate merchants’ ability to encourage customers to use particular” credit cards. Competitive Impact Statement at 12.

The Final Judgment, however, does not require that MasterCard and Visa implement any clear or reliable means to inform merchants of the particular Type of General Purpose Card being presented by a consumer at the point of sale. Without clear, conspicuous, and uniform means of identifying card types electronically or visually, it is uncertain how merchants will be able to identify such cards and practically take advantage of the rights they are about to receive under the Final Judgment.

III. JUDICIAL REVIEW UNDER THE TUNNEY ACT

The Antitrust Procedures and Penalties Act, also known as the Tunney Act, requires the Court to determine whether proposed antitrust consent judgments are “in the public interest.” 15 U.S.C. § 16(e)(1). “Congress, in passing the Tunney Act, intended to

prevent ‘judicial rubber stamping’ of the Justice Departments’ proposed consent decree The Court [is] to ‘make an independent determination as to whether or not entry of a proposed consent decree [is] in the public interest.’” *United States v. Microsoft Corp.*, 56 F.3d 1448, 1458 (D.C. Cir. 1995) (quoting House and Senate reports).

The Tunney Act enumerates mandatory factors which the Court must consider before approving any proposed judgment. These include the “competitive impact” of the judgment, “termination of alleged violations,” “provisions for enforcement,” “whether its terms are ambiguous,” as well as other “considerations bearing upon the adequacy” of the judgment and harm to third parties. 15 U.S.C. § 16(e)(1)(A-B).

The Tunney Act makes clear that the Court must carefully review the decree and accompanying materials for ambiguity, enforceability, and harm to third parties: “When the government and a putative defendant present a proposed consent decree to a district court for review under the Tunney Act, the court can and should inquire . . . into the purpose, meaning, and efficacy of the decree. If the decree is ambiguous, or the district judge can foresee difficulties in implementation, we would expect the court to insist that these matters be attended to. And, certainly, if third parties contend that they would be positively injured by the decree, a district judge might well hesitate before assuming that the decree is appropriate.” *Microsoft*, 56 F.3d at 1462 (“district judge pondering a proposed consent decree . . . should pay special attention to the decree’s clarity,” and “pay close attention to the compliance mechanisms”); *see United States v. Microsoft*, 231 F. Supp. 2d 144, 152 (D.D.C. 2002) *aff’d sub nom. Massachusetts v. Microsoft Corp.*, 373 F.3d 1199 (D.C. Cir. 2004).

When appropriate, courts have conditioned approval of a consent decree on the parties' willingness to accept specified changes. *See, e.g., Microsoft*, 231 F. Supp. 2d at 202 (conditioning approval on change to enforcement mechanism); *United States v. Thomson Corp.*, 949 F. Supp. 907, 931 (D.D.C. 1996) (approving a revised decree with one exception, requiring the parties to modify the settlement or propose alternatives); *United States v. AT&T*, 552 F. Supp. 131, 225-26 (D.D.C. 1982) (providing list of court-required modifications to meet public interest standard); *United States v. Gillette Co.*, 406 F. Supp. 713, 715 (D. Mass. 1975) (noting that the decree was modified in response to the court's explicit suggestions); *United States v. Associated Milk Producers Inc.*, 394 F. Supp. 29, 40 (W.D. Mo. 1975) (noting that "the proposed consent decree would not be approved unless [certain provisions] were modified").

IV. MERCHANTS SHOULD BE ABLE TO IMMEDIATELY DISTINGUISH BETWEEN CARD TYPES FOR THE SETTLEMENT TO BE EFFECTIVE

RILA strongly recommends that this Court consider modifying or clarifying the Final Judgment by adding a provision that requires that merchants be given electronic and visual means of distinguishing between Types of General Purpose Cards. In our view, such a provision will substantially enhance the settlement's effectiveness. This proposal is focused squarely on the anticompetitive practices targeted by the Complaint, which could be remedied by the proposed Final Judgment. *See, e.g., Complaint* ¶ 3 ("In short, Defendants' Merchant Restraints prohibit merchants from fostering competition among credit card networks *at the point of sale.*") (emphasis added). This type of minor implementation adjustment is consistent with the Final Judgment's agreed-upon repeal of

Visa and MasterCard’s anti-steering rules, and is well within this Court’s discretion to ensure that the decree is sufficiently clear and effective.

A. Merchants Need to Distinguish Between Types of Cards for the Settlement to Be Effective

Today, there are hundreds of millions of Visa and MasterCard General Purpose Cards in circulation issued by scores of banks. While the majority of these General Purpose Cards are rewards cards, many of them are indistinguishable from other Visa and MasterCard General Purpose Cards. Today, a merchant often cannot know which Type of General Purpose Card a customer is presenting because Visa and MasterCard do not require consistent and uniform branding on the card based on the Type of General Purpose Card that is being issued. Visa and MasterCard also do not make available to merchants electronic means of identifying the Types of Visa and MasterCard General Purpose Cards in circulation — including, for example, “product code identifiers” that Visa and MasterCard already maintain and use themselves. Without consistent, uniform branding on the cards and some form of electronic identifier, merchants will find it difficult to take advantage of their ability under the Final Judgment to steer consumers away from Types of General Purpose Cards to cheaper forms of payment. Without visual and electronic means that will enable merchants to efficiently identify Types of Visa and MasterCard General Purpose Cards when they are presented at the point of sale, merchants will be hard-pressed to provide “immediate” information, discounts or choices to consumers to encourage them to use cheaper forms of payment. Final Judgment Section IV.A(1).

B. Uniform Identifiers Will Ensure That the Settlement Is Effective

The Final Judgment does not require Visa and MasterCard to implement any clear or reliable means to signal to merchants the Type of Visa and MasterCard General Purpose Card being presented, including whether a particular General Purpose Card is a more expensive rewards card or a non-rewards card. This information will help effect the relief envisioned by the settlement — giving merchants the ability to offer “immediate” discounts and other information to consumers at the point of sale to motivate them to use cheaper forms of payment.¹⁰

1. Identification Provision

Any provision added to Section V of the proposed Final Judgment (“Required Conduct”) to address this problem should have two components, requiring both electronic and visual identification of payment card type.

Both electronic and visual methods are necessary because of the diversity of merchants and merchant locales. Many merchants, including merchants with sophisticated electronic systems, will prefer to use electronic identification. Less technically-proficient merchants may prefer to rely upon clear visual identification. Such differentiation also will be important to consumers as the benefits of the Final Judgment will be best realized if consumers are aware of the types of Visa or MasterCard General Purpose Cards they carry and understand their true cost.

As for electronic identification, MasterCard and Visa should be required to implement (to the extent they have not done so already) and make available at no cost to

¹⁰ The importance of this issue was quickly recognized by leading industry publications. “The effect of any change in Visa and MasterCard policy [under the decree] will depend on the ability of merchants to identify more costly cards and to give consumers a compelling reason to use an alternative.” The Nilson Report, Issue 958 at 7 (Oct. 2010).

merchants electronic means to identify the Types of Visa and MasterCard General Purpose Cards that qualify for distinct interchange tiers, based on the Type of Card.¹¹ Such means could include, but not be limited to, the “product code identifiers” that Visa and MasterCard use internally to differentiate between various types of General Purpose Cards. Such electronic means should enable merchants to identify the card Type *before* the transaction is sent out for authorization — and thus before the merchant is charged any fee for the transaction. Given that such electronic information is utilized by Visa and MasterCard for internal purposes and is known to issuing banks, there is no reason that it cannot be provided to merchants under Visa and MasterCard rules at no cost to merchants. Any claim that doing so would be burdensome or costly cannot withstand scrutiny.¹²

In addition to electronic identification, this provision should require that Visa and MasterCard amend their rules to require issuers of General Purpose Cards to reissue their cards, within the normal reissuance cycle, with a clear, conspicuous and uniform visual identifier denoting any Type of General Purpose Card that qualifies for distinct interchange treatment, based on the card Type. We propose that this rule require reissuance only within the normal reissuance cycle (usually three years due to wear and tear on the magnetic stripe) to eliminate any burden on the issuers. There is clear

¹¹ If Visa or MasterCard (or the banks or processors that deal with merchants) are permitted to charge for access to such electronic means of identification, they could use that to effectively nullify merchants’ ability to gain access to this information. As a result, it is important that these electronic means of identifying types of Visa and MasterCard cards — which can be given to merchants at no cost to Visa and MasterCard — be made available at no charge to merchants.

¹² RILA also requests clarification to Section IV.D to make it clear that it applies to electronic information or data that Visa and MasterCard maintain that indicates the Type of General Purpose Card that is being presented at the point of sale, which merchants can use to identify the Types of General Purpose Cards that qualify, based on card Type, for distinct interchange tiers. Specifically, RILA believes that the Final Judgment should make clear that Section IV.D would prohibit Visa and MasterCard from preventing, in any way, merchant access to electronic information or data that can be used to identify Types of General Purpose Cards, including the Types of General Purpose Cards that qualify for distinct interchange tiers.

precedent for such a requirement, including Visa and MasterCard’s ability to mandate that issuing banks comply with it. The settlement in the *Visa Check* case required “the creation of clear, conspicuous and uniform visual identifiers on Visa and MasterCard debit cards . . . so merchants and consumers can distinguish these products from credit cards.” *In re Visa Check/MasterMoney Antitrust Litig.*, 297 F. Supp. 2d 503, 508 (E.D.N.Y. 2003), *aff’d sub nom. Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 103 (2d Cir. 2005) (citing “the creation of clear, conspicuous and uniform visual identifiers on Visa and MasterCard debit cards”). Indeed, the prototypes of these identifiers were annexed to the district court’s published opinion. *Id.* at 527-30. And consistent with that requirement, all debit cards in the U.S. were reissued in a three-year period (2004-2007) with a “debit” identifier on the face of the cards.

For the Court’s consideration, RILA has respectfully drafted the following language:

1. Clear, Conspicuous and Uniform Card-Type Identifiers [VISA]

(a) Electronic Card-Type Identifier. Visa shall adopt rules, effective _____, requiring a unique identification code for each Type or other category of Visa General Purpose Card whose use in a transaction results in a merchant being charged an interchange rate that is different from any interchange rate that would be charged for an otherwise identical transaction if another Type or category of Visa General Purpose Card was used. The identification code for each Visa General Purpose Card shall be made available electronically to merchants at the point of sale in real time at no cost to the merchant.

(b) Visual Card-Type Identifier. Visa shall implement rules, effective _____, requiring issuers in the United States as they reissue credit cards in the normal reissuance cycle to place on the face of all Visa General Purpose Cards a card-category identifier corresponding to each Type or other category of Visa General Purpose Cards defined in sub-paragraph (a). This card-Type or -category identifier must be clear and conspicuous and used consistently and uniformly on all Visa General Purpose Cards.

* * * *

1. Clear, Conspicuous and Uniform Card-Type Identifiers [MASTERCARD]

(a) Electronic Card-Type Identifier. MasterCard shall adopt rules, effective _____, requiring a unique identification code for each Type or other category of MasterCard General Purpose Cards whose use in a transaction results in a merchant being charged an interchange rate that is different from any interchange rate that would be charged for an otherwise identical transaction if another Type or category of MasterCard General Purpose Card was used. The identification code for each MasterCard General Purpose Card shall be made available electronically to merchants at the point of sale in real time at no cost to the merchant.

(b) Visual Card-Type Identifier. MasterCard shall implement rules, effective _____, requiring issuers in the United States as they reissue credit cards in the normal reissuance cycle to place on the face of all MasterCard General Purpose Cards a card-category identifier corresponding to each Type or other category of MasterCard General Purpose Cards defined in sub-paragraph (a). This card-Type or -category identifier must be clear and conspicuous and used consistently and uniformly on all MasterCard General Purpose Cards.

2. Identification of Card Types Will Reduce Ambiguity and Make the Decree More Effective and Enforceable

It is well established that “[a] district judge pondering a proposed consent decree understandably would and should pay special attention to the decree’s clarity. The government may be entitled to rather broad discretion to settle with the defendant within the reaches of the public interest, but the district judge who must preside over the implementation of the decree is certainly entitled to insist on that degree of precision concerning the resolution of known issues as to make his task, in resolving subsequent disputes, reasonably manageable.” *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461-62 (D.C. Cir. 1995).

In the *Microsoft* case, which reversed the lower court’s rejection of a settlement under the Tunney Act, the court observed, however, that “the district judge was on solid ground in, at least, inquiring as to the product lines covered in the decree.” *Id.* at 1462. The court also observed that, “[s]imilarly” as with the issue of clarity, “we would expect

a district court to pay close attention to the compliance mechanisms in a consent decree.”
Id.

Accordingly, consideration of adding the provision discussed in this section to the Final Judgment is squarely within the Court’s authority. Adding language to require electronic and visual identifiers would substantially further these goals of achieving clarity and ease of enforcement of the settlement. Without a means to identify different Types of General Purpose Cards that qualify for different interchange rates, merchants’ ability to take advantage of this settlement will be substantially reduced.

C. Clarifications to Section IV.B

Section IV.B(4) provides that nothing in the Final Judgment will prevent Visa and MasterCard from 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.” RILA understands that Section IV.B(4) will not be interpreted to enable Visa and MasterCard to maintain rules that would prevent merchants from steering consumers from more expensive Visa and MasterCard rewards cards issued by one bank to a less expensive Visa or MasterCard credit card issued by another bank. We believe it would be helpful to clarify that the Section IV.B(4) will not derogate from the rights merchants are to be provided under Section IV.A of the Final Judgment.

V. CONCLUSION

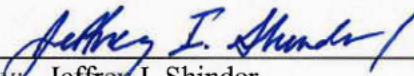
RILA appreciates the efforts of the Antitrust Division and State Attorneys General to facilitate competition in the General Purpose Card network services market

that could benefit merchants and consumers. RILA believes that the changes identified above will help merchants by giving them a more practical ability to take advantage of the Final Judgment's agreed-upon repeal of Visa and MasterCard's anti-steering rules. RILA appreciates consideration of these comments.

Dated: December 16, 2010

Respectfully,

CONSTANTINE CANNON LLP


By: Jeffrey I. Shinder

Todd Anderson

Owen Glist

450 Lexington Avenue, 17th Floor

New York, NY 10017

(212) 350-2700

One Franklin Square

1301 K Street, N.W., Suite 1050 East

Washington, DC 20005

(202) 204-3500

*Attorneys for the
Retail Industry Leadership Association*