

Department of Justice  
Washington, D.C. 20530

October 7, 1975

Francis R. Kirkham, Esquire  
Allan N. Littman, Esquire  
Pillsbury, Madison & Sutro  
225 Bush Street  
San Francisco, California 94104

Dear Messrs. Kirkham and Littman:

This is in response to your request of November 11, 1974, as supplemented by additional submissions, for a statement of the Division's enforcement intentions with respect to proposed by-law 2.16 of National BankAmericard, Inc. ("NBI"), pursuant to the Department's Business Review Procedure (28 C.F.R. 50.6).

Although the full scope, application and implications of proposed by-law 2.16 are not entirely clear, as we understand it the by-law would prohibit banks belonging to NBI from participating in any other bank credit card system. This prohibition would be applicable to both card-issuing banks and banks which accept merchants' deposits (agent banks). The by-law is applicable to joint participation by banks, not only in both NBI and Interbank Card Association (Master Charge), but also any other program presently existing or which may develop.

Proposed by-law 2.16, as originally presented to the staff, related solely to bank credit card systems, and the primary focus of our investigation and analysis of by-law 2.16 was on its likely impact on the bank credit card business. However, you have advised us that proposed by-law 2.16 will be further amended so as to become applicable to the so-called debit (or asset) card system which NBI has recently announced. It is our understanding that a debit card system consists essentially of an electronic funds transfer system (EFTS) in which the bank card is capable not only of effecting credit transactions but also can activate electronic point-of-sale terminals (or similar such devices) so as to accomplish withdrawals from deposits and similar basic banking functions. As you know, the debit card system is in an early stage of its evolution and only its general outlines can be perceived at

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this juncture. Though the debit card concept is in its infancy, it undoubtedly will have a substantial impact on the existing bank credit card systems. Consequently, the applicability of proposed by-law 2.16 to debit cards compels us to move considerably beyond analysis of the bank credit card business into the dynamic, rapidly evolving world of EFTS, about which little can be said categorically and which involves issues beyond those involved in an analysis of the traditional bank credit card business.

We propose, therefore, to address your request for a business review letter regarding proposed by-law 2.16 in two parts. First, we have reached several conclusions with respect to the antitrust implications of proposed by-law 2.16 insofar as it relates to bank credit card systems as they presently exist. As noted earlier, the proposed by-law flatly prohibits banks in the NBI system from any affiliation with any other national bank credit system. The by-law extends well beyond separation of electronic delivery and terminal systems, and automatically precludes every NBI agent bank in any market from being an agent bank in any other credit card system. We believe such a restriction might well handicap efforts to create new bank credit card systems and may also diminish competition among the banks in various markets. The same pertains to the operation of the by-law to prevent an NBI card-issuing bank from becoming an agent bank in a competing bank credit card system and to prevent an NBI agent bank from becoming a card-issuing bank in another system.

We do not have the same criticism of the proposed rule to the extent its application would prohibit an NBI card-issuing bank from becoming a card-issuing bank in a competing system. We believe that the existing competition between NBI and Interbank has been pro-competitive, and a prohibition of dual affiliation appears unobjectionable to the extent it is necessary to insure continued intersystem competition. It should be emphasized, however, that our views in this regard are based on an analysis of the bank credit card system as it presently exists and on the general impact of such a prohibition. We have not undertaken a detailed analysis of the impact of such a prohibition in particular markets. It is conceivable that unique competitive problems exist in particular markets which would be compounded by application of the prohibition of dual affiliation at the card-issuing bank level. As previously indicated, however, we have not undertaken the type of market by market analysis which would

be necessary to determine if, in fact, any such situations presently exist. In addition, we note that subsection 2.16(c) permits multi-bank holding companies to be card-issuing members of more than one system. On its face, this appears inconsistent with the basic rationale of the argument in support of a ban on duality.

As noted earlier, you intend to amend the proposed by-law so as to encompass "debit cards" as well as bank credit cards, which superimposes another level of analysis upon that which is relevant in the traditional bank credit card context. Thus, in order to intelligently evaluate proposed by-law 2.16 insofar as it relates to debit cards, it is necessary to have some fairly precise notion of what the EFTS phenomenon will ultimately consist of; how many EFTS systems there may be and whether they will be nationwide, regional, or local, or some combination thereof; what the impact of EFTS will be upon the banking industry; and what the role of the banking regulatory agencies in EFTS will be -- to mention only some of the pertinent areas. As you well know, at this point one can only conjecture what the future holds in store in the EFTS area. Consequently, it is impossible for us at this juncture to reach any firm conclusions concerning the competitive implications of proposed by-law 2.16 insofar as it relates to debit card systems and EFTS.

We are of the view that preservation of maximum flexibility and competitive opportunities in the EFTS field is of the utmost importance if EFTS is to develop in a way which provides consumers with a wide range of useful and competitive services. Thus, we are concerned that application of the proposed by-law to debit cards might unnecessarily limit the opportunities available to NBI member banks to participate in alternative debit card and EFTS developments.

In sum, on the basis of the information presently available to us, we cannot state that the Department of Justice would not institute a civil enforcement action should NBI adopt proposed by-law 2.16. As noted, we recognize that the credit and debit card businesses are rapidly evolving. Consequently, the relevant facts may change and the conclusions we have reached at the present time may have to be re-examined.

Your courtesy in presenting this matter to the Department and your cooperation in providing the information requested is appreciated.

Sincerely yours,

THOMAS E. KAUPER  
Assistant Attorney General  
Antitrust Division