



September 30, 2021

**VIA ELECTRONIC MAIL**

Federal Trade Commission  
600 Pennsylvania Ave, NW  
Washington, DC 20850

RE: Contract Terms that May Harm Competition, Request for Comment FTC-2021-0036-0022

Dear FTC Staff:

The payment card market has long been characterized by anticompetitive activity carried out by the two dominant payment card networks, Visa and Mastercard, as well as the largest card-issuing banks. While the Department of Justice and FTC have initiated enforcement actions and brought investigations to address these competition problems, more challenges remain for the FTC to address the root cause of the competition problems posed by these dominant payment networks. In light of the FTC's request for comments on contract terms that may harm competition, we wanted to bring to your attention the problems created by Visa and Mastercard contractual terms that prohibit the banks that issue credit cards that use the Visa or Mastercard networks from allowing those credit card transactions to be handled by competing card networks. These terms seriously inhibit competition for credit card network services and remove competitive market dynamics that might otherwise exist for credit card transactions.

By way of background, the National Association of Convenience Stores (NACS) represents the international convenience industry. In the United States, the industry consists of more than 150,000 stores and sells about 80 percent of the motor fuels purchased at retail across the nation. The industry handles approximately 165 million consumer transactions per day, about half of the U.S. population, and most of those transactions are made with payment cards.

The credit card market in the United States is very large. In 2020, for example, Visa credit card payments in the United States totaled \$1.97 trillion.<sup>1</sup> Mastercard credit card payments totaled \$837 billion.<sup>2</sup> Both of those figures were down from 2019 due to the pandemic, but it is clear that this market is significant. And, merchants as well as card-issuing financial institutions pay Visa and Mastercard fees on this large volume of transactions.

A number of companies across the nation provide payment network services that help facilitate debit and credit card transactions. Visa and Mastercard have market power in these markets, but companies including American Express, Discover, Star, Pulse, NYCE, Shazam, and more provide competing services. More than a decade ago, Congress noted the trend toward Visa and Mastercard locking major banks into exclusivity arrangements so that those banks would issue debit cards with only one network option (either Visa or Mastercard). Those arrangements dramatically reduced network competition for debit transactions and led to a reduction in debit networks overall. The result of Congress'

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<sup>1</sup> "Credit card market share statistics," by Tamara Holmes and Poonkulali Thangavelu (June 17, 2021) (available at [Credit Card Market Share Statistics -CreditCards.com](https://www.creditcardmarketshare.com)).

<sup>2</sup> Id.

interest was an addition to the Dodd-Frank Wall Street Reform and Consumer Protection Act. That addition, popularly known as the Durbin Amendment, granted the Federal Reserve regulatory authority over debit card fees and prohibited exclusive network arrangements on debit cards.

Problems remain with compliance with the non-exclusivity provisions of the Durbin Amendment and the FTC and Department of Justice have investigated actions that undermine those reforms. But, Visa and Mastercard provisions preventing network competition for credit card transactions have not yet been the subject of regulatory scrutiny and action. The time has come for such action because credit card network exclusivity continues to undermine competition and financial institutions that issue credit cards should have the option to contract with multiple networks whenever they find such arrangements to be beneficial to their businesses. Any and all contractual provisions preventing that freedom to contract with competitive networks should be removed.

## Background

Anticompetitive conduct in the payment card industry has led to multiple enforcement actions. In the late 1990s, for example, the Department of Justice brought suit against Visa and Mastercard for their “exclusionary rule” which prohibited banks that issued cards that could have transactions carried over the Visa and Mastercard networks from issuing separate cards that could be carried by other networks that competed with Visa and Mastercard (including, specifically, American Express and Discover cards).<sup>3</sup> The exception to this exclusion was that banks issuing cards with Visa logos could also issue cards with Mastercard logos and vice versa. The Department’s actions were successful and Visa and Mastercard can no longer bar banks from issuing cards whose transactions can be carried by American Express and Discover.

The Department of Justice also investigated, and in 2010 entered into a consent decree with Visa and Mastercard, regarding their rules preventing merchants from offering consumers discounts for the use of cheaper payment cards.

In 2016, the FTC investigated Visa and Mastercard for their actions preventing competition among debit card networks. That led the Federal Reserve to revise its guidance on Regulation II and required Visa and Mastercard to change their rules which prevented debit network competition on many transactions conducted at physical points of sale.<sup>4</sup>

These are merely some of the highlights of enforcement activity relating to the anticompetitive practices of Visa and Mastercard. These practices have traditionally been implemented through Visa’s and Mastercard’s operating rules.<sup>5</sup> These rules constitute contractual requirements that are placed on financial institutions that issue cards, acquirers and processors that process transactions, and merchants that accept card transactions. Many of the rules imposed by Visa and Mastercard work in concert to restrain competition by limiting the market choices available to financial institutions and/or merchants or limiting price cues available to consumers. There are more anticompetitive rules imposed by those two card networks than we are able to address in this letter including the honor-all-cards rule and the default setting of swipe fees. The full set of restraints on competition imposed by Visa’s and Mastercard’s rules are the

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<sup>3</sup> *U.S. v. Visa USA, Inc.*, 344 F.3d 229 (2d Cir. 2003).

<sup>4</sup> See FTC Closing Letter (Nov. 22, 2016) at [Closing Letter Advising Visa Inc. That the Federal Trade Commission's Bureau of Competition Has Closed Its Investigation - November 22, 2016 \(ftc.gov\)](#)

<sup>5</sup> See Mastercard Rules (11 Dec. 2020) at [Mastercard Rules](#); Visa Core Rules and Visa Product and Service Rules (17 April 2021) at [Visa Core Rules and Visa Product and Service Rules](#).

subject of private antitrust litigation that has been pending in the U.S. District Court for the Eastern District of New York since 2005. For an overview of the competition problems with those rules, we recommend reviewing the complaint filed against Visa, Mastercard and their largest card-issuing banks by our association along with a number of merchant companies in June 2013.<sup>6</sup>

At this time, however, we recommend that the FTC open an investigation of the competition problems created by Visa's and Mastercard's rules requiring exclusive networks on credit cards. Those contractual restrictions are particularly egregious restraints on competition among payment card networks and build upon work that the Commission has already done with respect to debit card network competition as explained below.

### Payment Network Competition

More than a dozen payment networks operate in the United States today. These include large, recognizable companies like Visa, Mastercard, American Express, and Discover. There are also a number of smaller networks that compete with the big names. These networks include companies such as Star, NYCE, Shazam, Accel, and Pulse, among others. These networks provide the communications connections among financial institutions that facilitate the processing of payment card transactions.

Today, these networks have developed technologies to handle a variety of transactions and methods of authentication. In fact, technology has created the ability to dramatically open competition for the communication of transaction information. Now, not only can the traditional networks carry this information from bank to bank to facilitate payments, but there are services that carry such information between consumers so that they can pass monetary value between each other using applications on their mobile devices. Financial technology companies like Paypal (Venmo), Square (Cash App), Apple (Apple Pay / Apple Cash), Zelle and others allow consumers to exchange funds through their mobile devices. These companies use a variety of technology providers to facilitate those communications including relatively new business-to-business services like Plaid, Finicity and others, or established bank-to-bank rails such as ACH. The pace of innovation has made the communication of financial information to transact value easier than ever and opened up more options than ever. But, for credit card transactions, Visa and Mastercard explicitly prohibit banks that issue their cards from using traditional and untraditional payment network service providers to help improve their credit card offerings' cost or service profiles. Rather than allow banks and merchants to deal directly with each other concerning their mutual customers, Visa and Mastercard impose themselves as intermediaries to continue to extract a toll on all credit card transactions. This clearly undermines competition for credit network services across the board.

It should be noted that having multiple networks on credit cards is not a new concept. In Europe, for example, many credit cards have multiple network options in order to comply with regulations in place there.<sup>7</sup> It is clear that this can be done and works well to enhance network competition.

On debit transactions, the Federal Reserve Board's Regulation II protects competition among the payment networks.<sup>8</sup> It holds that at least two unaffiliated networks must be available for each debit card and that merchants accepting debit cards for payment have the ability to choose which network they will use to handle each transaction. Even though there have been issues with compliance with Regulation II in

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<sup>6</sup> *7-Eleven, Inc. v. Visa Inc.*, Complaint (April 30, 2020) (available at [7-Eleven, Inc. v. Visa Inc., 1:13-cv-05746 – CourtListener.com](https://www.courtlistener.com/docket/133133/7-eleven-inc-v-visa-inc-1-13-cv-05746/)).

<sup>7</sup> See [EU Interchange Regulations | Worldpay from FIS \(fisglobal.com\)](https://www.fisglobal.com/en/eu-interchange-regulations)

<sup>8</sup> 12 C.F.R. §235

the marketplace and Visa and Mastercard continue to dominate the debit market, the regulation has been successful at lowering interchange fees for some transactions, as data from the Federal Reserve has shown.<sup>9</sup>

The FTC enforces Regulation II with respect to the payment networks. That was the basis for the FTC’s investigation and closing letter to Visa cited above. While there is no such legal requirement for credit transactions, multiple networks do today and others easily could, if presented with the opportunity, handle those transactions and compete with Visa and Mastercard. All of the major debit networks have “dual message” functionality traditionally used for credit transactions. Moreover, other entities in the payments ecosystem—processors—often connect directly and provide services directly to both issuers and merchants, providing additional existing pathways that would introduce competition for credit card transaction processing.

But, Visa and Mastercard do not allow the banks that issue their credit cards to do that. Those banks might want to enable multiple credit networks on their cards for a variety of reasons. For example, they might see it as giving them additional bargaining power with respect to the terms of their agreements with Visa and Mastercard, allowing them account portability that would avoid the need for a full-scale re-issuance of cards if they wanted to use another network. They might also see it as important to have the redundancy of a second network to avoid customer service problems that sometimes occur when one network has an outage. And, they might see other networks as providing service improvements on fraud detection and prevention, authorization rates, service time, and a number of other measures.

As noted, this would be similar to the interest that many banks showed in issuing credit cards from American Express and Discover in addition to Visa and Mastercard. Once the exclusionary rule imposed by Visa and Mastercard was lifted, it opened up more diverse credit offerings by U.S. banks. A similar dynamic can and should occur with respect to having multiple networks on individual credit cards. In the technologically vibrant world that exists today—in contrast to when these networks were first developed—banks should have the option to do that without restrictions imposed by Visa and Mastercard.

### Contractual Restrictions

The restrictions that Visa and Mastercard place on financial institutions that issue credit cards can be found not only in those networks’ rules that are mentioned above, but also in direct contracts between those networks and financial institutions. We do not have access to those direct contracts and how those contracts prevent the financial institutions from making their credit cards interoperable with more than one payment network, but the rules are available on Visa’s and Mastercard’s websites.

Those rules can be very difficult to follow, but our understanding is that they prohibit credit card issuers from enabling competing networks alongside Visa and Mastercard in the following ways:

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<sup>9</sup> Board of Governors of the Federal Reserve System, *2019 Interchange Fee Revenue, Covered Issuer Costs, and Covered Issuer and Merchant Fraud Losses Related to Debit Card Transactions* (May 2021) at 13 (“While the average interchange fee per exempt transaction processed over single-message networks was only slightly higher than that for covered transactions in 2019 (\$0.25 versus \$0.24), the average interchange fee per exempt transaction processed over dual-message networks was considerably higher than that for covered transactions (\$0.54 versus \$0.22). In addition, interchange fees for exempt transactions processed over dual-message networks increased after the regulation took effect, whereas average interchange fees for all other categories were either largely constant or falling over the same period. The average interchange fee for exempt transactions processed over single-message networks, in particular, fell from \$0.31 in 2011 to \$0.25 in 2019. The average interchange fee per covered transaction processed over dual-message networks declined the most, from \$0.58 in 2009 to \$0.22 in 2019.”).

- Mastercard rule 4.9 Use of Marks on Mastercard Cards states, “Except as expressly permitted by the Corporation, none of the following marks or similar or related mark, or any mark owned by or affiliated with one of these entities, may appear on a Card.
  1. American Express
  2. JCB
  3. Diners Club
  4. Discover
  5. Visa
  6. Any other name, logo, or mark identifying or in any way associated with a payment service that the Corporation deems to be competitive with any Mastercard product or Program.”<sup>10</sup>

That Mastercard rule, then, specifically prohibits card issuers from issuing cards that can use a Mastercard competitor network. If that were not a clear enough prohibition of competition, the rule goes on to provide that:

“Any such competitor’s credit or debit POI mark, logo, or name, regardless of whether registered, may not appear on a Card, nor may a payment application of any such competitor reside on the magnetic stripe or chip of a Card.”

The Mastercard rules make it clear that, in the United States, this is aimed entirely at credit cards and that card issuers are able to comply with the Regulation II rule requiring multiple debit networks in its section on “Additional U.S. Region and U.S. Territory Rules.” That section of the rules includes an addition to rule 4.9 stating, “In the U.S. Region and U.S. Territories, the Rule on this subject is modified as follows. A competing or other debit point-of-sale marks may appear on a debit Card as set forth in the Card design Standards or as otherwise agreed to by the Corporation.”<sup>11</sup>

Visa rules are similar to Mastercard’s in prohibiting competition on credit cards. In particular, Visa’s prohibition states:

- “3.2.3.2 Prohibition of Non-Visa Payment Functionality on Visa Cards  
A Member must not use a Functional Type or any other Mark on a Visa Card to facilitate payment for goods or services. This includes any mixture of alphanumeric characters that denotes participation in a program or benefit (for example: a loyalty or rewards program, a membership identification number).”<sup>12</sup>

The Visa rules go on to clarify that other networks are allowed on U.S. debit cards in order to ensure compliance with Regulation II. Visa’s prohibition is so complete, in fact, that it explicitly states that the alternative payment network that Visa itself owns, Interlink, cannot appear on a credit card with Visa operability.<sup>13</sup> No other competing payment networks are explicitly mentioned as Visa rule 3.2.3.2 clearly prohibits them on credit cards.

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<sup>10</sup> Mastercard Rule 4.9 (Dec. 11, 2020) at 89.

<sup>11</sup> Mastercard Rule 4.9 (Dec. 11, 2020) at 302.

<sup>12</sup> Visa Product and Service Rules 3.2.3.2 (April 17, 2021) at 156.

<sup>13</sup> Visa Product and Service Rules 3.2.3.3, Table 3-1 (April 17, 2021) at 156.

It should be noted that there may be additional ways that Visa and Mastercard block network competition on credit cards. For example, those two networks often maintain that they “own” certain bank identification numbers (BINs) that are used to determine the routing of credit card transactions. There is no validity to any institution’s claim of “ownership” over these standardized numbers, but that claim, paired with the market power of these two networks and the attendant hesitation of anyone else in the market to challenge such claims, gives Visa and Mastercard additional leverage to control how transactions are processed and may provide them with a way to prevent competition even if the rules noted above were removed.

Given these clear rules, the direct contracts and related business arrangements between Visa, Mastercard and their card-issuing banks likely bolster (perhaps more explicitly) the prohibitions against banks including competitors to Visa and Mastercard on the credit cards those banks issue. It would be fruitful for the FTC to investigate in order to see those contracts, examine the full set of those business arrangements, and determine the root cause of, and ways in which, Visa and Mastercard restrict competition among networks for handling credit card transactions.

### Competition Concerns

The competition law and policy concerns with Visa’s and Mastercard’s prohibitions should be evident. The two payment networks have been found to have market power<sup>14</sup> and they have chosen to use that market power to exclude banks from allowing competitors to handle transactions on those banks’ credit cards. As of last year, Visa had about a 60 percent market share of the credit and debit market and Mastercard had 30 percent. American Express was far behind at 8.5 percent.<sup>15</sup> Given that background, the restrictions imposed on credit card network competition create glaring competition problems. Those restrictions stop the market from evolving and prevent smaller players from introducing innovations that could upset the incumbents’ market share. Antitrust law does not and should not permit these types of strong-arm tactics.

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We appreciate the opportunity to provide comments on contract terms that harm competition. While this comment focuses on Visa’s and Mastercard’s prohibitions on network competition for credit card transaction business, the universe of anticompetitive restrictions imposed by those two companies is long. We would be happy to provide more information on any of those anticompetitive activities to the extent that that would be helpful to the Commission.

Sincerely,



Doug Kantor  
NACS General Counsel

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<sup>14</sup> *U.S. v. Visa U.S.A.*, 344 F. 3d 229 (2<sup>nd</sup> Cir. 2003), *cert. denied*, 543 U.S. 811 (2004).

<sup>15</sup> “Swiping their way higher: Visa, Mastercard could be the next \$1 trillion companies,” by Lewis Krauskopf (Jan. 31, 2020) (available at [Swiping their way higher: Visa, Mastercard could be the next \\$1 trillion companies | Reuters](#)).