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## Price Fixing And Tying Arrangements Between Credit Card Issuers And Retailers

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## PRICE FIXING AND TYING ARRANGEMENTS BETWEEN CREDIT CARD ISSUERS AND RETAILERS

In recent years, reliance by consumers on the use of credit cards has significantly increased.<sup>1</sup> As a result of this development, retail merchants have experienced a greater need to maintain one or more credit card services in order to capture business generated through increased use of the cards.<sup>2</sup> The resulting bolstered demand by retailers for the credit card service<sup>3</sup> may have placed card issuers in positions of "market power"<sup>4</sup> and thus enabled them to impose certain conditions with respect to the sale of the card service to retailers which may be violative of the antitrust laws as unlawful price-fixing or tying arrangements.<sup>5</sup>

During the first decades of the twentieth century credit cards were

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<sup>1</sup>The House Subcommittee on Special Small Business Problems of the Select Committee on Small Business [hereinafter referred to as Committee] concluded in a report concerning the impact of credit cards on small business that

based upon the evidence and testimony presented [in hearings held by the Committee], credit cards have become an accepted mode of transacting business and are rapidly increasing both in scope and usage. Bank credit cards alone, at the end of 1969, were being offered by 1,207 commercial banks with a total of \$2.6 billion of credit outstanding, not including several thousand banks participating as agents for banks with credit card plans. In a little over two years, the number of banks operating their own credit card plans has increased six times, while the amount of credit outstanding has quadrupled, and in 1969 alone the number of banks with credit card plans increased by 137 percent and the amount of credit outstanding doubled. Today there are over 300 million credit cards in circulation in the United States, and it appears that approximately 100 million are being added each year. This year it is expected that consumers will buy more than \$50 billion worth of goods and services on credit cards.

H.R. REP. NO. 91-1500, 91st Cong., 2d Sess. 55-56 (1970) [hereinafter referred to as *Report*].

<sup>2</sup>The Committee has also concluded that "[a] credit card plan can provide a small retailer with a capacity for credit sales he would not otherwise have." *Id.* at 55. Large retailers would also presumably be able to increase their sales volume by accepting purchases made with credit cards other than their own.

<sup>3</sup>This increased demand is based not only on the increased business which is captured by accepting credit card purchases, but also undoubtedly upon other advantages which are inherent in credit card operations. The Committee has concluded that the use of credit cards is of significant benefit to the retailer in that it expedites the process of receiving payments for accounts receivable and reduces the risk of bad check losses. *Report* at 55.

<sup>4</sup>Note 89 *infra*. This concept will become relevant with respect to tying arrangements only, since price-fixing is violative of the antitrust laws regardless of the existence of "market power." See notes 23-26 and accompanying text *infra*, for a discussion of the per se rule which applies to price-fixing agreements.

<sup>5</sup>In a recent address before the Practising Law Institute, Basil J. Mezines, Executive

issued primarily by hotels to their regular patrons, and by department stores and gasoline station chains.<sup>6</sup> By the mid-1950's Diners Club, American Express and Carte Blanche had begun the issuance of travel-oriented credit cards.<sup>7</sup> Concurrently, banks began to become involved in credit card operations.<sup>8</sup> Although the magnitude of the initial losses sustained in starting credit card plans forced several banks to discontinue the service,<sup>9</sup> by the latter half of the 1960's many banks were successfully engaged in credit card operations.<sup>10</sup>

Both travel-oriented and bank credit cards involve tripartite arrangements,<sup>11</sup> including agreements between the issuer<sup>12</sup> and the cardholder, the issuer and the retailer, and the cardholder and the retailer. With respect to both travel-oriented and bank credit cards, the issuer charges the retailer a certain percentage of the total sales volume transacted through the credit card service. This percentage is referred to as the "discount,"<sup>13</sup> and is customarily somewhat greater in the case of travel-oriented cards.<sup>14</sup> It is with regard to the relationship between the

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Director of the Federal Trade Commission, stated:

As I now see it, credit card issuers, whether they are banks, airlines or oil companies, can become involved with antitrust laws in a number of ways. They might, for example, charge competing users of the service, such as retailers, different service fees; they might impose or attempt to impose on retailers their ideas as to the price which should be charged by these users to credit card holders; or they might attempt a tie-in of the credit card privilege with other services or commodities which they sell to the users.

Address by Basil J. Mezines, before the Practising Law Institute, New York City, Oct. 23, 1970 [hereinafter referred to as *Address #1*]. See printed version, which may be obtained from the Federal Trade Commission upon request, at 21-22.

As is indicated by the above language, price discrimination is also an area in which credit card issuers could be violating the antitrust laws. Further, there is the possibility that issuers have monopolies in certain areas of the credit market, or that they are engaged in conspiracies to monopolize. The scope of this note, however, will be limited to the areas of price fixing and tying arrangements, which are both governed by per se concepts of illegality. Notes 37 and 79 *infra*.

<sup>6</sup>*Hearings on H.R. 66 Before the Subcomm. of the House Select Comm. on Small Business*, 91st Cong., 2d Sess., at 258 (1970) [hereinafter referred to as *Hearings*].

<sup>7</sup>*Id.*

<sup>8</sup>*Id.*

<sup>9</sup>*Id.*

<sup>10</sup>*Report* at 55.

<sup>11</sup>See Davenport, *Bank Credit Cards and the Uniform Commercial Code*, 1 VALPARAISO U.L. REV. 218, 224 (1967).

<sup>12</sup>With respect to travel-oriented cards, the issuer is a non-bank corporation. *Hearings* at 266.

<sup>13</sup>E. FARNSWORTH & J. HONNOLD, *CASES AND MATERIALS ON COMMERCIAL LAW* 432 (2d ed. 1968).

<sup>14</sup>*Hearings* at 266.

issuer and the retailer where possible antitrust violations may arise.<sup>15</sup>

Unlawful price-fixing might occur where the issuer demands that the retailer, as a condition to the privilege of handling credit card purchases, charge the same prices to credit card purchasers as to cash purchasers.<sup>16</sup> Evidence exists that many credit card issuers enter into contractual agreements<sup>17</sup> with retailers to the effect that the retailer must refrain from the practice of discriminating against cardholders who wish to make purchases with their cards by passing on to them all or part of the discount in the form of increased prices.<sup>18</sup> There is further evidence that in some instances retailers are contractually precluded from engaging in the practice<sup>19</sup> of offering merchandise at reduced prices to individuals who are willing to pay cash for items purchased.<sup>20</sup> The Executive Director of the

<sup>15</sup>See *Address #1*, *supra* note 5, at 21-22.

<sup>16</sup>*Report* at 56.

<sup>17</sup>A specific example of such an agreement is the following clause appearing in BankAmericard retailer contracts:

[T]he member will make no special charge or exact any special agreement, condition or security from a BankAmericard holder in connection with any sale draft drawn.

*Hearings* at 108.

<sup>18</sup>In response to a question as to why this type of preclusionary phrase was placed in BankAmericard retailer contracts, Kenneth V. Larkin, senior vice president of marketing of the Bank of America, stated:

In other words, our policy is that our discount rate more than offsets or is more than offset by [the retailers'] cost of carrying receivables. We do not want them dumping that discount rate on the cardholder and saying, "That is to pay for the cost of my discount to the bank," because it just was not true. The cost of the discount to the bank was offset by his diminished collection costs, nonrecourse in the matter of receivables and so forth. That is really why we did it.

*Id.*

<sup>19</sup>As to the actual existence of this type of activity on the part of retailers, William V. O'Connor, Jr., attorney for the Marine Midland Trust Company of Western New York, presented the following testimony:

We have merchants who advertise, as a matter of fact, there is one not three blocks from the bank, who has tags on everything in his discount house, and it is \$5 for a lighting fixture, but if you pay cash it is only \$3.88. If you use our charge card or anybody else's or their own credit system it is \$5.

*Id.* at 49.

<sup>20</sup>John Murray, assistant general counsel of the American Express Company, responded in the affirmative to the following question put to him:

Your merchant contract contains a provisions [sic] in it which precludes one of your participating merchants from granting a noncredit discount or discriminating against your cardholder in any way; is that correct?

*Id.* at 193.

Federal Trade Commission has suggested that these contractual agreements may constitute price-fixing<sup>21</sup> and thus run afoul of section 1 of the Sherman Act.<sup>22</sup>

An actual price-fixing problem may exist because the agreements "would in effect deprive the retailers of their special right to price their goods and services as they see fit and would, therefore, seem to be 'interference with the setting of price by free market forces [which] is illegal *per se*.'" <sup>23</sup> This *per se* violative concept of price-fixing originated in *United States v. Trenton Potteries Co.*,<sup>24</sup> where the Court held that a price-fixing agreement was in itself an unreasonable restraint of trade,<sup>25</sup> and has been consistently adhered to in subsequent cases.<sup>26</sup> Notwithstanding this *per se* rule, credit card issuers may well make various arguments in defense of these agreements with retailers.

One major area of argument may be that because of various considerations of necessity, the credit card issuer is forced to contractually preclude retailers from either discriminating against credit card purchasers by increasing prices or favoring cash purchasers by reducing prices. A representative of one credit card issuer<sup>27</sup> has predicated such a

<sup>21</sup>Basil J. Mezines, Executive Director of the Commission, stated in this regard:

[R]egardless of the good faith of the issuer in trying to encourage use of his credit cards, any attempt to interfere in the retailer's pricing of what are his products rather than the issuer's is fraught with grave peril. While some areas of antitrust law are conjectural, as all lawyers well know, one thing is dead certain. The Commission and the courts deal sternly with price fixing and price tampering. There is absolutely no defense to this practice, and any credit card issuer who involves himself with the prices charged by his customers—whatever his reasons—is buying a lawsuit.

*Address #1, supra* note 5, at 24.

<sup>22</sup>The section states in relevant part:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .

<sup>23</sup>Letter from Ronald A. Bloch, Attorney for the Bureau of Competition of the Federal Trade Commission, to the author, Mar. 2, 1971, citing *United States v. Container Corp. of America*, 393 U.S. 333, 337 (1969).

<sup>24</sup>273 U.S. 392 (1927).

<sup>25</sup>The Court stated:

Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed and without placing on the government in enforcing the Sherman Law the burden of ascertaining from day to day whether it has become unreasonable through the mere variation of economic conditions.

*Id.* at 397-98.

<sup>26</sup>Note 37 and accompanying text *infra*.

<sup>27</sup>William V. O'Connor, Jr., attorney for the Marine Midland Trust Company of Western New York. *Hearings* at 49.

necessity upon Regulation Z of the Truth in Lending Act.<sup>28</sup> The act requires the issuer, once a retailer has passed on any portion of the applicable discount to a cardholder, "to include the total amount of the merchant discount as a finance charge in [its] bill to the customer."<sup>29</sup> He explained that since the sales slips received by the issuer do not reveal such additional charges imposed by the retailer, the only means by which the issuer can comply with the regulation is to contractually preclude the retailer from engaging in such a practice.<sup>30</sup> This argument is asserted in defense of the contractual preclusion of raising the retail price of merchandise on credit card sales.<sup>31</sup>

Another necessity defense is asserted in support of the practice<sup>32</sup> of issuers of contractually precluding retailers from offering merchandise at reduced prices to individuals who are willing to pay cash for items purchased.<sup>33</sup> The nature of the defense is that such agreements are justifiable as a necessary means of promoting the increased use of credit cards.<sup>34</sup>

The Supreme Court has addressed itself in the past to various justifications asserted by parties allegedly engaged in unlawful price-fixing and has consistently held them ineffectual.<sup>35</sup> Mr. Justice Douglas, delivering the opinion of the Court in *United States v. Socony-Vacuum Oil Co.*,<sup>36</sup> stated:

Thus for over forty years this Court has consistently and without deviation adhered to the principle that price-fixing agreements are unlawful *per se* under the Sherman Act and that no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense.<sup>37</sup>

It seems doubtful, in light of this judicial attitude, that any court would

<sup>28</sup>Consumer Credit Protection Act, Pub. L. No. 90-321 (1968); F.R.B. Reg. 2, 12 C.F.R. 226 (1969).

<sup>29</sup>Hearings at 49.

<sup>30</sup>*Id.*

<sup>31</sup>Mr. O'Connor stated that the practice of retailers of offering items at reduced prices to cash purchasers would not be in violation of the contractual agreement entered into by Marine Midland and retailers. *Id.*

<sup>32</sup>Note 19 *supra*.

<sup>33</sup>Note 40 *infra*.

<sup>34</sup>Address by Basil J. Mezines, before the Practising Law Institute, Los Angeles, California, December 6, 1970 [hereinafter referred to as *Address #2*]. See the printed version, which may be obtained from the Federal Trade Commission upon request, at 3.

<sup>35</sup>Note 37 and accompanying text *infra*.

<sup>36</sup>310 U.S. 150 (1940).

<sup>37</sup>*Id.* at 218.

deem either facilitation of compliance with Regulation Z<sup>38</sup> or promotion of increased use of credit cards<sup>39</sup> as an adequate justification for what may otherwise be unlawful price-fixing.<sup>40</sup>

A second area of controversy involves the assertion by credit card issuers that the only effect these agreements may have, if any, is that of setting a range of prices.<sup>41</sup> As such, it has been urged they are not per se violations of the Sherman Act within the meaning of the Supreme Court's language in *Socony-Vacuum*, notwithstanding the broad scope given to the per se rule of price-fixing<sup>42</sup> in that case.<sup>43</sup> Such an assertion by the issuers may be based upon the fact that the agreements do not preclude retailers from setting the basic prices for their products as long as they do not discriminate against credit card purchasers, by way of increasing prices, or favor cash purchasers, by way of offering price reductions. However, these limitations upon the discretion of retailers, regardless of their freedom to determine basic prices, may be where the agreements fail to qualify as innocuous restrictions.<sup>44</sup> It has been stated that "an essential element [of price-fixing] is the competitor's surrender, express or implied,

<sup>38</sup>Note 28 and accompanying text *supra*.

<sup>39</sup>Note 34 and accompanying text *supra*.

<sup>40</sup>With specific regard to the promotion argument, Basil J. Mezines has indicated his opinion that such an argument is not an adequate justification for tampering with retailers' prices. He states, in this context:

It only remains to consider the argument that this practice is a commendable effort to encourage the wider use of credit cards. I can't agree, for it seems to me that the purpose of such an agreement is to tamper with the retailers' prices to their customers. But even if I were to concede that the practice produces a laudable result, its inextricable relationship with retailers' resale prices makes it run afoul of the antitrust laws.

*Address #2, supra* note 34, at 3.

<sup>41</sup>*Id.* at 2.

<sup>42</sup>Note 37 and accompanying text *supra*.

<sup>43</sup>The Court stated:

As we have indicated, the machinery employed by a combination for price-fixing is immaterial.

Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*.

310 U.S. at 223.

<sup>44</sup>Walter B. Comegys, Deputy Assistant Attorney General, Antitrust Division, Department of Justice, has stated:

Though seemingly just and reasonable on their face, these contractual provisions also operate as a restraint on the merchant's independent options in selling his goods and services. As between cash and credit customers, they foreclose differential pricing based upon his different cost structures, either by imposing a surcharge on credit cardholders for the cost of their credit to him or by offering discounts for cash purchases.

*Hearings* at 173.

of some measure of pricing discretion.”<sup>45</sup> If absolute discretion is the test to be met, these issuer-retailer agreements would seem to fall short of such a criterion.

A case in which comparable agreements were held to be per se violations of the Sherman Act as unlawful price-fixing is *United States v. Gasoline Retailers Association*.<sup>46</sup> There, one of the allegations was that agreements between a union and an association of gasoline retailers to the effect that members of the latter would refrain from advertising as to prices and from giving premiums, including trading stamps, had the effect of restraining “the freedom of gasoline retailers in the conduct of their business.”<sup>47</sup> The Court of Appeals for the Seventh Circuit relied on the Supreme Court’s language in *Socony-Vacuum*<sup>48</sup> in holding the agreements to be per se violative of the Sherman Act as price-fixing.<sup>49</sup> It was held that the “concerted scheme [was] designed to affect prices,”<sup>50</sup> and that this was enough to bring it within the realm of per se illegality.<sup>52</sup>

The allegation to the effect that the discretion of the retailers was impaired, coupled with the court’s language to the effect that agreements designed to affect prices are per se violations, would seem to present a situation closely analogous to the credit card issuer-retailer agreements under consideration. It would be difficult to refute that if the agreements are to any extent complied with,<sup>52</sup> the discretion of the retailer to charge what he wishes for his merchandise would be impaired.<sup>53</sup> It necessarily follows that the agreements are designed to affect the prices at which the retailer markets his products.

Another argument available in defense of these contractual agreements is that prior to any declaration that they are unlawful, an investigation as to their relative success must be undertaken.<sup>54</sup> Here, it could be urged that there are no effective means by which these agreements can be enforced,<sup>55</sup> and that therefore the actual effect is not in

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<sup>45</sup>*Checker Motors Corp. v. Chrysler Corp.*, 283 F. Supp. 876, 882 (S.D.N.Y. 1968) (cash rebate offered to purchasers by manufacturer held not within scope of section 1 of the Sherman Act).

<sup>46</sup>285 F.2d 688 (7th Cir. 1961).

<sup>47</sup>*Id.* at 689.

<sup>48</sup>Note 43 *supra*.

<sup>49</sup>285 F.2d at 691.

<sup>50</sup>*Id.*

<sup>51</sup>*Id.*

<sup>52</sup>It will, however, be established that the success of a price-fixing agreement is irrelevant. Note 58 and accompanying text *infra*.

<sup>53</sup>Note 44 *supra*.

<sup>54</sup>*Address #2, supra* note 34, at 3.

<sup>55</sup>*Hearings* at 49.



restraint of trade as specified by the Sherman Act.<sup>56</sup> However, the Supreme Court in *Socony-Vacuum*<sup>57</sup> made it explicit that the extent to which agreements aimed at fixing prices actually accomplish that purpose is irrelevant.<sup>58</sup> Thus there need be no investigation as to success, and these issuer-retailer agreements, if otherwise violative of the Sherman Act as pricefixing, will not be excused by their ineffectiveness.

A final area of inquiry as to price-fixing pertains to agreements which preclude the retailer only from engaging in the practice of discriminating against cardholders who wish to make purchases with their cards by increasing the prices at which they can obtain merchandise.<sup>59</sup> The argument could be made that this particular type of agreement, tending to fix only a maximum range of prices, would in fact be beneficial to the consumer and thus escape illegality under section 1 of the Sherman Act.<sup>60</sup> The Supreme Court, however, in *Albrecht v. Herald Co.*,<sup>61</sup> held that setting maximum prices, as well as minimum prices, is a violation of the Act.<sup>62</sup> The Court's statement that "[t]he assertion that illegal pricefixing is justified because it blunts the pernicious consequences of another distribution practice is unpersuasive,"<sup>63</sup> would seem to invalidate an assertion by credit card issuers that contractual preclusion is necessary to prevent retailers from passing on the discount to credit card purchasers.<sup>64</sup> Thus, regardless of whether the discount is a reasonable cost which retailers should be expected to absorb as the price to be paid for the credit card service, or whether the increased prices are unfair burdens to be placed upon credit card purchasers, the preclusionary agreements would seem to be unlawful as per se violations of the Sherman Act within the meaning of the Court's language in *Albrecht*.

An interesting development with respect to these issuer-retailer agreements is that Senator William Proxmire of Wisconsin has recently introduced a bill into Congress which would amend the Truth in Lending Act.<sup>65</sup> The amendment would prohibit issuers from attempting to preclude

<sup>56</sup>Note 22 *supra*.

<sup>57</sup>310 U.S. 150 (1940).

<sup>58</sup>The Court stated:

It is the "contract, combination . . . or conspiracy in restraint of trade or commerce" which § 1 of the Act strikes down, whether the concerted activity be wholly nascent or abortive on the one hand, or successful on the other.

*Id.* at 225 n.59.

<sup>59</sup>Note 17 and accompanying text *supra*.

<sup>60</sup>Address #2, *supra* note 34, at 2.

<sup>61</sup>390 U.S. 145 (1968).

<sup>62</sup>*Id.* See also *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951).

<sup>63</sup>390 U.S. at 154.

<sup>64</sup>Note 18 *supra*.

<sup>65</sup>S. 652, 92d Cong., 1st Sess. § 170 (1971).

retailers from offering reduced prices to cash customers.<sup>66</sup> The enactment of such an amendment would provide an additional means of holding this particular type of arrangement illegal.<sup>67</sup> The type of agreement which precludes retailers from increasing prices at which credit card purchases may be made would remain subject only to the standards of illegality imposed by the antitrust laws.<sup>68</sup>

In addition to price-fixing, another area in which credit card issuers may be violating the antitrust laws involves tying arrangements.<sup>69</sup> Such violations might occur where the retailer's privilege of handling credit card purchases is tied to the purchase of some other product or service offered by the credit card issuer.<sup>70</sup> It is well settled that such "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier"<sup>71</sup> may be an illegal tying arrangement.<sup>72</sup>

With specific reference to bank credit cards, evidence exists<sup>73</sup> that in some instances retailers which utilize the credit card service are required to

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<sup>66</sup>Section 170, which is entitled "Use of Cash Discounts," reads as follows:

(a) With respect to a credit card which may be used for extensions of credit in sales transactions in which the seller may be a person other than the card issuer, the card issuer may not, by contract or otherwise, prohibit such sellers from offering a discount to a cardholder to induce payment in cash rather than the use of a credit card.

(b) With respect to any sales transaction, any discount not in excess of 5 per centum offered by the seller for the purpose of inducing the payment of cash at the time of the transaction rather than the use of credit shall not constitute a finance charge as defined under section 106 provided such a discount is offered to all prospective buyers and its availability is disclosed to all prospective buyers clearly and conspicuously in accordance with regulations prescribed by the Board.

*Id.* at 8-9.

<sup>67</sup>Because the language of the amendment specifically precludes the credit card issuer from prohibiting retailers from offering price reductions to cash purchasers, if it were to pass, an examination of antitrust precedent would be less crucial with respect to actions brought by the Federal government, since the agreements could be attacked on the more concrete ground of a specific statutory prohibition. In the case of actions instituted by individuals, however, antitrust precedent would remain important because of the treble damages feature of the antitrust laws. See A. NEALE, *THE ANTITRUST LAWS OF THE UNITED STATES OF AMERICA* 5 (2d ed. 1970).

<sup>68</sup>Since Section 170(a) of the Proxmire bill does not involve this area, an examination of antitrust law with respect to these agreements would still be important with respect to actions brought by the Federal government as well as by individuals. Note 66 *supra*.

<sup>69</sup>For a definition of tying arrangements, see note 71 and accompanying text *infra*.

<sup>70</sup>*Address #1, supra* note 5, at 21-22.

<sup>71</sup>*Northern Pac. Ry. v. United States*, 356 U.S. 1, 5-6 (1958).

<sup>72</sup>*Id.*

<sup>73</sup>*Kenneth V. Larkin*, senior vice president of marketing of Bank of America, testified as follows:

[Retailers] were required to open up a deposit account to deposit the

maintain an account with the issuing bank.<sup>74</sup> It has been suggested<sup>75</sup> that this requirement may be violative of the antitrust laws as an illegal tying arrangement.<sup>76</sup> The tying product would be the credit card service, while the tied product would be the bank account service which the retailer is required to purchase.<sup>77</sup>

As with price fixing,<sup>78</sup> there is a per se rule with respect to tying arrangements.<sup>79</sup> However, that there has been a violation with respect to tie-ins does not necessarily follow from the mere fact that a tying agreement exists.<sup>80</sup> There must also be an examination of the seller's economic power in the tying product market,<sup>81</sup> and of the amount of

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drafts, because the procedure for handling the drafts is that the merchant brings in the drafts as often as he wishes, and he is encouraged to bring them in promptly, and receives immediate credit for them in his account.

*Hearings* at 96.

<sup>74</sup>With respect to BankAmericard, the bank with which the retailer must open an account is not necessarily a member of the Bank of America chain. On the contrary, in most cases the bank is one of the many banks which has agreed with Bank of America to handle its credit card operations.

<sup>75</sup>*Address #1, supra* note 5, at 21-22.

<sup>76</sup>Mr. Mezines' remarks were directed from the point of view of section 3 of the Clayton Act, 15 U.S.C. § 14 (1964), *formerly* ch. 323, § 3, 38 Stat. 731 (1914). Because of the possible jurisdictional problems with respect to the "commodities" language of that section, he presented the following explanation:

Credit card issuers would probably argue that they are selling a service and not a tangible commodity since the Commission's Clayton Act jurisdiction is limited to the sale and transfer of commodities. However, since under Section 5 of the Federal Trade Commission Act, [15 U.S.C. § 41 (1964)], our jurisdiction is not limited to the sale and transfer of commodities and since we can use that Act to enjoin practices which violate the "spirit" of the Clayton Act, I foresee no real jurisdictional difficulties.

*Address #1, supra* note 5, at 22.

As a practical matter, section 1 of the Sherman Act has been used to hold tying arrangements illegal as combinations in restraint of trade, regardless of whether the product involved could accurately be characterized as a commodity. *Fortner Enterprises v. United States Steel Corp.*, 394 U.S. 495 (1969). *Cf. United States v. Loew's Inc.*, 371 U.S. 38 (1962) (film); *Northern Pac. Ry. v. United States*, 356 U.S. 1 (1958) (land); *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953) (advertising space).

<sup>77</sup>Here, the word "purchase" is not used in the traditional sense, as where cash is given in exchange for merchandise. However, it would seem difficult to controvert the argument that banks do in effect sell their banking services. Note 109 *infra*. It would further seem uncontrovertable that depositors "purchase" the services since inherent in depositing funds in one bank is the opportunity cost of foregoing the services of other banking institutions.

<sup>78</sup>Note 37 and accompanying text *supra*.

<sup>79</sup>*International Salt Co. v. United States*, 332 U.S. 392, 396 (1947).

<sup>80</sup>*Id.*

<sup>81</sup>In general, this market consists of all existing retailers which could conceivably purchase credit card services. *Id.*

commerce affected in the tied product market.<sup>82</sup>

With regard to the seller's economic power in the tying product market, the test which has developed is whether the seller has "sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product . . . ."<sup>83</sup> As to what actually constitutes sufficient economic power, the law is somewhat less clear. In fact, there has yet to be a specification of the definite percentage of the market required.<sup>84</sup> The Supreme Court, however, in *Fortner Enterprises v. United States Steel Corp.*,<sup>85</sup> has provided some measure of clarification by defining the necessary degree of power as "whether the seller has the power to raise prices, or impose other burdensome terms such as a tie-in, with respect to any appreciable number of buyers within the market."<sup>86</sup>

Using these criteria as guidelines, an examination of the credit card market is required in order to determine whether credit card issuers possess the prerequisites necessary for applying the per se rule with respect to tying arrangements. While there are a substantial number of banks throughout our economy involved in the issuance of credit cards,<sup>87</sup> a few such banks account for a disproportionately large segment of the credit card industry.<sup>88</sup> As far as the price criterion specified in *Fortner* is concerned, this may mean that only those few banks are in positions of

<sup>82</sup>The relevant market here is composed of all existing retailers which could conceivably "purchase" the bank account services. For the fact that this overall examination must be undertaken, see *Northern Pac. Ry. v. United States*, 356 U.S. 1, 6 (1958).

<sup>83</sup>*Id.* The "sufficient economic power" test has developed through the Court's liberalization of standards which were previously applied. See *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 610 (1953); *United Shoe Mach. Corp. v. United States*, 258 U.S. 451 (1922).

<sup>84</sup>In *United Shoe*, where the "monopoly power" test was applied, control of 95% of the market was held to be adequate. In *Times-Picayune*, where the "market dominion" test was used, control of 40% of the relevant market was held not to be sufficient. 345 U.S. at 611-12. It would seem that the "sufficient economic power" criterion espoused by the Court in *Northern Pacific* would require less market control than either of the above mentioned tests, but the exact percentage which will be required is uncertain.

<sup>85</sup>394 U.S. 495 (1969).

<sup>86</sup>*Id.* at 504. Although this reference to "power to raise prices" would seem to be traditional monopoly language, the Court, in indicating that actual monopoly power was not necessary to constitute a per se violative tying arrangement, stated:

the presence of any appreciable restraint on competition provides a sufficient reason for invalidating the tie. Such appreciable restraint results whenever the seller can exert some power over some of the buyers in the market, even if his power is not complete over them and over all other buyers in the market.

*Id.* at 503.

<sup>87</sup>Note 1 *supra*.

<sup>88</sup>BankAmericard, Interbank Card and Midwest Bank Card account for a very substantial portion of the industry. *Hearings* at 326-29.

“market power,”<sup>89</sup> enabling them to raise prices<sup>90</sup> and restrict output.<sup>91</sup> Thus, applying this test, only that small number of banks would have the prerequisite “substantial economic power” to bring them within the realm of per se illegality.<sup>92</sup>

However, the reference in *Fortner* to the power to “impose other burdensome terms such as a tie-in . . . ,”<sup>93</sup> indicates the existence of an alternative means of satisfying the “sufficient economic power” criterion. This may mean, as the Court stated in *Northern Pacific Ry. v. United States*,<sup>94</sup> that “[t]he very existence of this host of tying arrangements is itself compelling evidence of the defendant’s great power, . . . .”<sup>95</sup> Thus, under this alternative analysis, any credit card issuer imposing tying arrangements on an appreciable number<sup>96</sup> of retailers would bring itself within the “sufficient economic power” criterion espoused by the Court in *Northern Pacific*.<sup>97</sup>

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<sup>89</sup>It is important to maintain the distinction between this concept and those of “monopoly power” and “market dominion” which were required by the Court at different points in time throughout the development of this area of per se illegality of tying arrangements, since different percentages of the market may be required. Cases cited notes 83-84 *supra*.

<sup>90</sup>The prices here would be the applicable discounts. Note 13 *supra*.

<sup>91</sup>Output, in this context, refers to the number of retailers the credit card issuer will allow to handle the credit card service.

As to the effect of a seller’s “market power,” the Court in *Fortner* stated:

Market power is usually stated to be the ability of a single seller to raise price and restrict output, for reduced output is the almost inevitable result of higher prices.

394 U.S. at 503 (1969).

<sup>92</sup>Of course if the demand by retailers for the credit card services were extremely substantial, it is conceivable that a much greater number of banks could raise prices and restrict output, and thus have “sufficient economic power.”

<sup>93</sup>394 U.S. at 504.

<sup>94</sup>356 U.S. 1 (1958).

<sup>95</sup>*Id.* at 7-8.

This has been the view taken in subsequent cases. One court has stated:

Congress singled out tie-ins for special treatment in the Clayton Act upon the generally accepted view that they rarely have any function other than suppression of competition. For the same reason, a seller’s successful imposition of a tying arrangement on a substantial amount of commerce may be taken as proof of his economic power over the tying product.

*Advance Business Systems & Supply Co. v. SCM Corp.*, 415 F.2d 55, 62 (4th Cir.), *cert. denied*, 397 U.S. 920 (1969). *Accord*, *Siegel v. Chicken Delight, Inc.*, 311 F. Supp. 847 (N.D. Cal. 1970).

<sup>96</sup>This phrase has yet to be specifically defined by the courts. However, it would seem that in view of the rather hostile attitude toward tie-ins most, if not all, credit card issuers would be said to deal with enough retailers so as to bring any tying arrangement entered into by them within the scope of this criterion. See *Hearings* at 326-29, for an account of volumes of business of the various credit card issuers.

As to whether there has been an adequate amount of commerce affected in the tied product market,<sup>98</sup> an arrangement is said to qualify as a per se violation when "a 'not insubstantial' amount of interstate commerce is affected."<sup>99</sup> The main point of controversy in this area is whether the amount of commerce to be examined relates to the particular issuer-retailer agreement under scrutiny, or to the "total volume" of commerce affected by all of the agreements with retailers into which the particular issuer involved has entered.<sup>100</sup> The initial support of the latter as the proper test appeared in *Fortner*, where the Court discussed the total amount of United States Steel sales which had been tied between 1960 and 1962.<sup>101</sup> This "total volume" approach has been followed in subsequent lower court decisions.<sup>102</sup> With this as a guideline, it would seem that since each of the 62 banks reporting in a Federal Reserve Board survey had over 50 million dollars in deposits associated with its credit card operations, at least these institutions do enough business to satisfy the "not insubstantial" criterion.<sup>103</sup>

Notwithstanding the foregoing analyses, certain defenses have been

<sup>97</sup>356 U.S. 1 (1958).

An interesting way of precluding this entire examination of substantial economic power in the tying product market would be to apply the "uniqueness" test initially utilized in *United States v. Loew's Inc.*, 371 U.S. 38 (1962). The rationale is that if the product is legally or physically unique, "[i]t alone is the relevant market and therefore the requisite economic power can be inferred from the seller's control over the item." Comment, 69 COLUM. L. REV. 1435, 1439 (1969).

Conceivably, an argument could be made that as among all of the bank credit cards, BankAmericard and Interbank Card are unique in the sense that they are apparently the only such cards that are accepted on a nationwide basis. This would, however, be an extension of the "uniqueness" test traditionally applied because neither the BankAmericard nor the Interbank Card is either legally or physically unique.

<sup>98</sup>Note 82 and accompanying text *supra*.

<sup>99</sup>*Northern Pac. Ry. v. United States*, 356 U.S. 1, 6 (1958).

<sup>100</sup>This examination of the amount of commerce affected has been aptly referred to as the "dollar test of substantiality." Comment, 69 COLUM. L. REV. 1435, 1439 (1969).

In *International Salt Co. v. United States*, 332 U.S. 392, 395-96 (1947), the Court held that \$500,000 of tied sales was not "insignificant or insubstantial." Since that time, at least until 1969, the *de minimis* level remained at that figure. However, in *Fortner Enterprises v. United States Steel Corp.*, 394 U.S. 495, 502 (1969), the Court held that \$190,000 was not "paltry or insubstantial." There is some confusion as to whether the *de minimis* level is now set at that figure but, in any event, the Court allowed the total volume of tied sales to be taken into account. Note 101 and accompanying text *infra*.

<sup>101</sup>The Court stated:

For purposes of determining whether the amount of commerce foreclosed is too insubstantial to warrant prohibition of the practice, therefore, the relevant figure is the total value of sales tied by the sales policy under challenge, not the portion of this total accounted for by the particular plaintiff who brings suit.

394 U.S. at 502.

<sup>102</sup>See generally cases cited note 95 *supra*.

<sup>103</sup>See *Hearings* at 326-29.

utilized as a means of removing the taint of illegality from otherwise per se violative tying arrangements.<sup>104</sup> The defense most relevant to credit cards seems to be that the tying and tied products are so interrelated as to constitute virtually a "single product," and as such no tying arrangement in fact exists. In *Dehydrating Process Co. v. A. O. Smith Corp.*,<sup>105</sup> the court was faced with the decision as to whether the imposition of a requirement by the seller of silos that the buyer also purchase a silo unloader was an illegal tie-in. In holding that this agreement was not per se violative as a tying arrangement, the court expressed the view that the entire transaction was in effect the sale of a "single product." It was stated in this regard that "articles, though physically distinct, may be related through circumstances."<sup>106</sup> Under the circumstances of the case, the silo unloader which was produced by the seller was the only type which could be effectively utilized to unload the silos. It could be argued by credit card issuing banks that the requirement of maintaining a bank account with the issuer is similarly an integral part of the sale of the credit card service and as such the account is "ancillary"<sup>107</sup> to the sale of the service. This argument could conceivably be utilized to bring these issuer-retailer agreements within the "single product" defense approved by the court in *Dehydrating Process*.<sup>108</sup> However, tending to negate the validity of such an assertion is evidence to the effect that a bank's general banking business is considered as completely separate from its credit card operations.<sup>109</sup> Thus the "single product" argument would seem to be rendered less viable as a defense.

Even if these issuer-retailer agreements were held not to be per se

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<sup>104</sup>See *Dehydrating Process Co. v. A.O. Smith Corp.*, 292 F.2d 653 (1st Cir.), *cert. denied* 368 U.S. 931 (1961) ("single product" defense successfully asserted); *United States v. Jerrold Electronics Corp.*, 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961) ("infant industry" defense successfully asserted).

<sup>105</sup>292 F.2d 653 (1st Cir.), *cert. denied*, 368 U.S. 931 (1961).

<sup>106</sup>*Id.* at 655. See also *Fortner Enterprises v. United States*, 394 U.S. 495, 522 (1969) (Fortas, J. dissenting).

<sup>107</sup>See *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *modified*, 175 U.S. 211 (1899). See also S. OPPENHEIM AND G. WESTON, *FEDERAL ANTI-TRUST LAWS* 4 (1968).

<sup>108</sup>*Dehydrating Process Co. v. A.O. Smith Corp.*, 292 F.2d 653 (1st Cir.), *cert. denied*, 368 U.S. 931 (1961).

<sup>109</sup>A question propounded to Donald E. Cielewich, senior vice president of the Marine Midland Trust Co. of Western New York, along with his response thereto, appears as follows:

Mr. Smith. Do you operate this [credit card business], then, as strictly a separate business, separate and apart from the bank?

Mr. Cielewich. Yes, we do. We obviously try to sell that merchant, that customer, on all the business of the bank, and we are primarily interested in the credit card side.

*Hearings* at 47.

violative of the antitrust laws, there remains the possibility that they may be considered as violative of the "general standards" of the Sherman Act.<sup>110</sup> Here, an analysis of the effects of the agreements must be undertaken. This becomes relevant especially in the situation where the retailer is required to maintain a "drawing down"<sup>111</sup> account with the issuing bank. With a "drawing down" account, the retailer is free to remove his funds from the issuing bank immediately after its account has been credited with the proceeds of credit card transactions and to deposit them in other banks.<sup>112</sup> It could therefore be argued that the actual effect of this type of limited requirement is not in restraint of trade.<sup>113</sup> However, there is evidence<sup>114</sup> to the effect that retailers which do open "drawing-down" accounts eventually become fully participating customers, and further, that these deposits have helped sustain the increased growth of the credit card operations of banks.<sup>115</sup> It therefore seems conceivable that the actual effect of this limited form of tying arrangement could be considered to be in restraint of trade. This conclusory statement is derived from the fact that even though retailers may be free to remove funds credited to their accounts by issuing banks, as a practical matter they do not choose to do so. This undoubtedly has a detrimental effect on banks which are not involved in credit card operations to the extent that funds do in fact remain in credit card issuing banks.<sup>116</sup>

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Further evidence of the separate nature of the credit card aspect of a bank's overall business is the fact that even though the Federal Trade Commission does not have jurisdiction over banks, it has held in its recent ruling as to the unsolicited mailing of credit cards that it does have jurisdiction over this activity because credit cards are "outside the sphere of a bank's essential function."

*Address #1, supra* note 5, at 21.

<sup>110</sup>In *Fortner*, the Court stated:

A plaintiff can still prevail on the merits whenever he can prove, on the basis of a more thorough examination of the purposes and effects of the practices involved, that the general standards of the Sherman Act have been violated.

394 U.S. at 500.

<sup>111</sup>Kenneth V. Larkin of BankAmericard has stated:

He [the retailer] may immediately withdraw the funds and put them, let us say, in another bank account if that is his wish. To this day, many thousands of merchants who are BankAmericard merchants have their major checking accounts at another bank and use the account in our bank just as a drawing down account.

*Hearings* at 96.

<sup>112</sup>*Id.*

<sup>113</sup>It might be said that because the retailer is free to withdraw funds at his discretion, there is no restraint upon his right to exercise his option as to where to maintain his general banking business.

<sup>114</sup>*Hearings* at 112.

<sup>115</sup>*Id.*

<sup>116</sup>*Address #1, supra* note 5, at 24.