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NEW DIRECTIONS IN BANKCARD COMPETITION

Jules Bernard*

Ever since 1971, when the Worthen Bank & Trust Company challenged the membership rules of National BankAmericard, Inc., people have been studying the competitive nature of bankcard services and debating how these services should be treated under the antitrust laws. The debate has recently focused on bankcard services that use electronic funds transfer (EFT) technology. All sides agree that these new bankcard services can help make the financial industry more efficient, more innovative, and more responsive to the needs of consumers. The sides disagree, however, on the role of these services in the nation's economy and on the proper way to introduce them into the retail banking market.

The Department of Justice has suggested four ways to make the bankcard industry more competitive:

—Forbid all banks in any market to join in a single bankcard system, even one that agrees to accept all banks that apply for admission;

—Bar the Federal Reserve from using its automated clearing house (ACH) facilities as the central switch for a bankcard system;

—Liberate bankcard terminals from the constraints that are applied to full-scale branches; and

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The views expressed in this paper are those of the author alone. They do not necessarily reflect the opinions of the Federal Deposit Insurance Corporation.


2. In general, I will use the term “bankcard” to mean any kind of card that gives a consumer access to an account (either depository or credit-line) at a depository institution. Furthermore, I will call all depository institutions “banks” unless the context requires more precision. For the purposes of these remarks, there is little reason to distinguish among commercial banks, savings and loan associations, mutual savings banks, and credit unions; and the term “depository institution” is just too unwieldy. Further, with the adoption of the Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, 94 Stat. 132 (1980) [hereinafter cited as DIDMCA], thrifts seem to be well on their way to full EFT powers.
—Preempt state compulsory-sharing laws, under which banks that operate bankcard facilities must allow any other banks to use them on reasonable and nondiscriminatory terms. The National Commission on Electronic Fund Transfers (NCEFT) has espoused a procompetitive policy for bankcard systems and has generally endorsed the Justice Department’s proposals on these points. These proposals are rooted in the notion that bankcard systems are highly integrated entities. From this perspective, each part of a system—the cards, the terminals, the transmission lines, the switch, and even the banks’ own computer operations—must be designed to fit with every other part, and every part must take its form from all the others. Banks have to work together very closely when they develop integrated systems of this kind. There is little room for any individual participating bank to go its own way, either in offering unique services or in charging lower prices, and there is almost no room at all for independent innovation. Accordingly, the focus of antitrust attention falls on the entire bankcard system as the basic competitive unit. Groups of banks are expected to compete against one another in developing special capabilities, extra cost advantages, and improved technology. This “systems level” competition is supposed to produce a flexible and responsive bankcard industry in which several regional systems do battle against one another in local markets.

This view of the bankcard industry may be on its way to oblivion. For one thing, the structure of the bankcard industry has changed a great deal, largely in response to one of the Justice Department’s earliest—and least representative—public statements. Where once the two major bankcard organizations maintained their distance from one another, today they share a common pool of members. The differences between the organizations are more those of services provided than of constituency. For another, the technology of bankcard systems has advanced. Third-party companies that specialize in the techniques of data communications now


4. See notes 50-53 and accompanying text infra.

5. See notes 31-39 and accompanying text infra.
stand ready to provide interchange services to banks on a pay-as-you-go basis. Accordingly, the banks no longer have to create their own infrastructure for producing bankcard services, and they no longer have to work so closely with one another in designing and planning their systems. So long as they adhere to certain standards, they can be confident of having access to a multibank network.

In light of these changes, the Justice Department's four proposals have lost much of their force and may no longer deserve much attention. Moreover, EFT services are continuing to evolve. They are beginning to merge into, and become part of, more general data communications services — services that are provided by companies outside the financial sector and used by banks and nonfinancial companies alike. This trend raises new and difficult questions about the proper limits of the "business of banking" and about the proper ways to regulate it.

I. National BankAmericard and the Antiduality Rule

The antitrust issues in the bankcard industry first became apparent in the fall of 1970. At that time, the two national bank credit card organizations — National BankAmericard, Inc. (NBI) and Interbank — were struggling for dominance. Historically the two systems had remained separate from one another, each organization viewing the other as a rival.

Both NBI and Interbank had two kinds of members: card-issuing banks and "agent banks" that did not issue cards themselves, but merely processed the credit slips engendered by credit card transactions. In most communities, NBI licensed only one bank to issue BankAmericards, although it had no formal policy of doing so, and in some major cities gave licenses to several banks. Interbank, by contrast, opened its doors to all would-be card issuers. No bank, however, issued both cards. On the other hand, both NBI and Interbank authorized many banks to process credit slips as agent banks. A large number (including some card issuers) belonged to both systems for that purpose.

Worthen Bank and Trust Co., the dominant bank in Little Rock, Arkansas, belonged to NBI and issued BankAmericards. Worthen saw that it could gain a competitive edge by issuing both cards to its customers. Worthen submitted its application to Interbank in November of 1970, and in April of the following year Interbank granted it. Worthen began to make preparations to issue Master Charge cards.

NBI strongly disapproved of Worthen's initiative. In September of 1971, it adopted By-law 2.16, known as the "antiduality" rule, to
strengthen the barriers between the two credit card organizations. By-law

6. By-law 2.16 read as follows:

Section 2.16. Requirements with Respect to other Credit Cards.

(a) No Class A member shall directly or indirectly (i) own, (ii) issue, (iii) assist in the issuance of, (iv) service, (v) honor, or (vi) enter into contractual relationships with persons for the issuance of, or with merchants to honor, any Credit Cards except (1) as permitted pursuant to sections 2.04 and 2.05, (2) Area Credit Cards, and (3) Credit Cards owned or issued by any organization licensed to conduct the BankAmericard program in a foreign country.

(b) No Class A member shall directly or indirectly accept for deposit or purchase any instruments arising from the use of any Credit Cards except those arising from (i) Credit Cards issued pursuant to sections 2.04 and 2.05, (ii) Area Credit Cards, and (iii) Credit Cards owned or issued by any organization licensed to conduct the BankAmericard program in a foreign country.

(c) No Class B member shall directly or indirectly (i) enter into contractual relationships with persons for the issuance of Credit Cards, except as may be permitted by section 2.05 or (ii) own or issue in its own name Credit Cards, or (iii) appear on Credit Cards or elsewhere as the owner or issuer thereof, except Area Credit Cards.

(d) If a parent, subsidiary or affiliate of a member takes any action which the member may not take under the provisions of this section, such member shall be deemed thereby to have violated this section unless, in the case of affiliates, (i) there are no common officers or employees engaged in the management or operation of both BankAmericard and other Credit Card programs and (ii) the operations—including, without limitation, marketing, authorization, credit, collection and solicitation—of such programs are separate; provided that paragraph (c) shall not apply to parents, subsidiaries and affiliates which are Class A members. The provisions of section 2.15 shall apply, without limitation, to all officers and employees engaged in the operation of a member's Credit Card program and to all directors of members.

(e) The provisions of this section shall not apply during periods necessary to (i) convert a credit card program to or from the BankAmericard program or (ii) make an adjustment to a Credit Card program as required for compliance with this section, provided such conversion or adjustment is completed in accordance with such conditions and in such time as the corporation may require, which time shall not exceed twelve months from (1) the effective date of this section, (2) the date of acceptance of membership, (3) the date of delivery of notice of termination, or (4) the date of any future acquisition, merger or other circumstances which necessitates an adjustment hereunder, as the case may be.

(f) “Credit Cards” as used in this section mean any instruments, whether in the form of a card, book, plate, coupon, or other credit device, owned or issued by a bank (including any of its parents, subsidiaries or affiliates) which may be used to obtain money or to purchase or lease property or services on credit but do not include letters of credit or any such instruments usable exclusively for the obtaining of money from such bank or the guaranteeing of checks.

(g) “Area Credit Cards” as used in this section mean any Credit Cards that are owned, issued, serviced, and honored exclusively by one bank and honored by merchants having a direct contractual relationship with such bank, except that such bank may appoint any other bank as its agent with respect to the Area Credit Card program for the sole purpose of accepting for deposit sales drafts from such merchants arising from the use of such Area Credit Cards.

345 F. Supp. at 1312.
2.16 forbade NBI card issuers to issue, honor, or service credit cards of other national credit card organizations. The new rule also prohibited NBI’s agent members — the banks who merely processed credit slips for merchants — from issuing cards of any other national credit card system. The rule did not apply to local or regional credit cards, nor did it affect credit cards issued by entities outside the field of banking, such as travel-and-entertainment companies or department stores. In short, By-law 2.16 excluded from the NBI system any bank that issued Master Charge cards.

Worthen challenged the antiduality rule in the Eastern District of Arkansas.\(^7\) Worthen had not yet begun to issue Master Charge cards, having agreed to stay its hand while the matter was in dispute. Accordingly, there was no actual experience with the competitive effect of By-law 2.16. The two parties agreed to present stipulated facts to the court, and the court based its ruling on those stipulated facts.

It is important to keep in mind that, at the time the case was before the district court, both credit card systems relied entirely on paper documentation. The banks processed credit slips in the same way they cleared paper checks: that is, they transported them physically, using the facilities provided by companies in other lines of commerce (courier services, the Post Office, and so on). The bankcard organizations had little power to improve the delivery-and-interchange mechanism. As far as they were concerned, this part of their business was governed by a static technology that was common to them both.

But both organizations also foresaw that they would soon be able to convert to computerized communications. In that event, the organizations would be able to differentiate their clearing-and-delivery services and compete on that basis. NBI and Worthen agreed to stipulate that, inasmuch as they were both studying the possibility of using EFT techniques, this kind of systems-level competition already existed. The parties further agreed to stipulate that this form of competition would be foreclosed if the systems were to merge.\(^8\)

Worthen rested its case on the claim that the antiduality rule amounted to a group boycott on the part of the NBI members, the purpose and effect of which was to inhibit Worthen from competing as vigorously as possible against other banks for the business of consumers and merchants. NBI rejoined that if any bank could issue both cards, the membership of NBI and Interbank would soon become identical, and systems-level competi-

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tion between the two bankcards would vanish.\(^9\) The district court, apparently persuaded by Worthen's arguments, found that the antiduality rule denied opportunities to banks that issued the Master Charge card to the ultimate detriment of consumers and merchants: "Both merchants and consumers will be better served if they are allowed to do business with a bank which handles both cards. Despite NBI's arguments to the contrary, the court believes that this will inspire even greater competition between the two systems."\(^10\)

Nevertheless, the court felt compelled to deal with NBI's argument that the rule would improve systems-level competition. The court quoted a passage from Judge Learned Hand's opinion in *United States v. Associated Press.*\(^11\) In that case, the newspapers belonging to the Associated Press (AP) each had the power to veto applications for membership filed by any rival newspapers. Judge Hand rejected this veto power and required the AP to accept applicants on a nondiscriminatory basis, saying:

> The argument appears to be that if all be allowed to join AP, it may become the only news service, and get a monopoly by driving out all others. That is perhaps a possibility, though it seems to us an exceedingly remote one; but even if it became an actuality, no public injury could result. For, if AP were open to all who wished the service, could pay for it, and were fit to use it, it would be no longer a monopoly: a monopoly of all those interested in an activity is no monopoly at all, for no one is excluded and the essence of monopoly is exclusion.\(^12\)

The *Worthen* court's reliance on Judge Hand's reasoning is questionable, considering that the Supreme Court completely revised the analysis that Judge Hand set forth, and, in particular, declined to accept Judge Hand's reliance on monopoly principles.\(^13\) But there is a still more forceful reason

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10. *Id.* at 1322.
12. *Id.* at 374-75.
13. Judge Hand asserted that the AP constituted a kind of partial monopoly: it had enough market power to raise prices and exclude competitors even though it was not the only organization of its kind in the field. He also said that the AP controlled a vital commodity — to wit, the news gathered by its members. Accordingly, drawing on the "public utility" doctrine of *United States v. Terminal R.R. Ass'n of St. Louis,* 224 U.S. 383, 409 (1912), Judge Hand imposed the duties of a monopolist on the AP, and forced it to open its doors to new members on a nondiscriminatory basis. *United States v. Associated Press,* 52 F. Supp. at 362, 375-76 (1943).

On appeal, the Supreme Court accepted Judge Hand's remedy, but rejected his analysis. The Court looked upon the AP as being a collection of competitors bound together by a web of agreements. The Court said that the AP members enjoyed enough market power to inflict
why the *Worthen* court should have rejected Judge Hand's line of reasoning. In *Associated Press*, no one was concerned with the question of technological advances in the news-clearing industry; the AP, like its rival news organizations, used whatever communications lines were available. By contrast, the credit card industry stood on the threshold of major technological changes — changes that might, if allowed to develop freely, become the principal focus of competition in the market for consumer services.

On appeal of the district court's decision, the Court of Appeals for the Eighth Circuit requested the Department of Justice to file an amicus brief. The Department urged the court to refrain from applying a rigid *per se* test:

> [T]he very novelty and complexity of the questions indicate that they should have been resolved only after a full trial. Such a trial may establish that the result reached by the District Court is correct, and that the restraints imposed by By-Law 2.16 are . . . so harmful as to be illegal *per se*. On the other hand, a full record may show that the by-law is not only reasonable, but that it preserves competition between the several bank credit card systems.

The Eighth Circuit accepted the Justice Department's advice. The court noted particularly that there was no way to predict, on the basis of the record before it, how dual membership might affect the growth of new technological systems and procedures for verifying credit cards. It therefore reversed the district court's decision and directed it to test the by-law by the rule of reason.

The retrial never took place. Instead, NBI redrafted the by-law to make it even more stringent than before and submitted it to the Department of Justice for clearance under the Business Review Letter procedure. The competitive injury on their rivals, and that they had acquired this power by pooling their resources, not by any special productive efforts of their own. The Court further said that, given that the AP members had power of this magnitude (although not necessarily monopoly power), their agreements would necessarily result in a competitive disadvantage for non-participating newspapers. The Court refused to let the AP members misuse their pooled power in this fashion. *Associated Press* v. United States, 326 U.S. 1, 15-18 (1945). *See also* Bernard, *Some Antitrust Issues Raised by Large Electronic Funds Transfer Systems*, 25 CATH. U.L. REV. 749, 756-58 (1976).

15. *Id.* at 126.
16. *Id.* at 129.
17. *Id.* at 130.
18. 28 C.F.R. § 50.6 (1979).
new by-law required complete separation between NBI and Interbank, forbidding duality not only for card issuers, but for agent banks as well.

The Justice Department proceeded very cautiously in reviewing the NBI by-law and the credit card industry. NBI submitted its request on November 11, 1974. The Department asked for and received a number of additional submissions, and finally issued its opinion on October 7, 1975, nearly a year after NBI's request — and just under four years from the date that Worthen filed its complaint against NBI in the Arkansas district court. The banking industry had changed a great deal in the meantime. Both Interbank and NBI were already moving forward with plans for adapting EFT to their credit card operations and for tying cards directly into deposit accounts. EFT was also well underway in related areas. The first automated clearing house (ACH) associations were being formed, and the first automated teller machines (ATMs) being deployed; the debate over the relation between the ACHs and point-of-sale (POS) systems had already started.

II. THE NBI LETTER

The "NBI Letter," as it came to be called, is one of the most important events in the development of EFT — not so much for what it said, as for the industry's response to it. Upon reading the Department of Justice opinion, and thinking about the relative strengths of NBI and Interbank, NBI decided to drop its rule against duality. It is no exaggeration to say that the NBI Letter set the bankcard industry on the road to standardized technology and full interchange.

Many observers believe that standardization and interchangeability are most welcome. These conditions, they point out, make life much easier for merchants (who can use one terminal and deal with one bank) and for consumers (who can carry just one card, and use it anywhere). Additionally, these conditions arguably make it easier for smaller banks to enter the bankcard field. Whatever the merits of these claims, however, standardization and interchangeability are not what the Department of Justice was looking for in the EFT industry. In fact, the Department's later statements suggest that it continued to hope that systems-level competition would flourish. After the NBI Letter, however, there was little chance of that.

The Justice Department's NBI Letter treated revised By-law 2.16 as if it

20. See note 3 supra.
were really two rules: first, a rule against dual membership in two organizations that produce “traditional bank credit card” services (i.e., services that rely on paper documentation and interchange); and second, a rule against dual membership in competing EFT systems. These two matters, the letter said, raised different issues which needed to be dealt with separately.

The Department conceded it had no way to analyze the problems raised by dual membership in competing EFT systems:

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.

Nevertheless, the Department declared:

We are of the view that the 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 members to participate in alternative debit card and EFTS developments.

In sum, the Department of Justice issued a clear warning that, in the newly-developing area of EFT, NBI's by-law risked attack.

For all their menace, however, these passages do not account for NBI's reaction to the letter or for the profound effect the letter had on the EFT industry. For the explanation of that effect, it is necessary to examine the other half of the Department's analysis—that is, the discussion of paper-based credit card services. On this point, the Department said:

The proposed by-law . . . 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

21. NBI Letter, supra note 19, at 2. The Department confused two major distinctions in the payment services industry: namely, the distinction between credit card and debit card payment services on one hand, and the distinction between paper-based delivery mechanisms and EFT delivery mechanisms on the other. The Department treated debit services as if they were identical with EFT services. It did not admit that a bank could offer credit card services by means of EFT mechanisms, or that debit card services could exist without them. Although a precise recognition of these distinctions might be vital in other contexts, here, the lack of precision is only mildly confusing and does not seriously undermine the Department's reasoning.

22. Id. at 3.

23. Id.
handicap efforts to create new bank credit card systems and may also diminish competition among the banks in various markets.\textsuperscript{24}

The Department did not explain its reasoning further. Apparently, however, it believed that the by-law could make it hard to find banks that would be eligible to process the credit slips for a new bankcard organization — particularly if Interbank were to adopt a parallel restriction. The Department may also have believed that, unless banks could compete freely among themselves to service merchants, the discount fees, that is, the fees banks charged merchants for accepting credit slips, would remain comparatively high.\textsuperscript{25}

At the same time, however, the Department of Justice was content to accept the by-law's prohibition against banks issuing both cards, even in the context of a purely paper-based system. Once again the Department offered no analysis. It merely stated: "We believe that the existing competition between NBI and Interbank has been procompetitive, and a prohibition of dual affiliation appears unobjectionable to the extent it is necessary to insure continued intersystem competition."\textsuperscript{26} The Department offered no clue as to how far that "extent" extended. On the contrary, it immediately went on to suggest that there might indeed be cases where the antiduality rule could produce anticompetitive effects by preventing a bank from issuing both cards. The Department also suggested that NBI's entire rationale for imposing the antiduality rule was suspect on the grounds that NBI failed to prohibit multibank holding companies from issuing different cards through different bank subsidiaries.\textsuperscript{27}

It is unclear why the Department decided to reject the antiduality rule in the case of agent banks and yet retain it for card issuers. Duality among card issuers would improve competition among banks for the patronage of consumers to the same degree that duality among agent banks would improve competition for the patronage of merchants. Indeed, if intersystem competition is valuable and worthy of preservation, it makes no sense to preserve competition for the two systems in some aspects, and then to unite the systems in other respects. The card-issuing banks would have to consider the needs of the agent banks when making innovations, while the

\textsuperscript{24} Id. at 2.

\textsuperscript{25} Id. The Department said that the by-law was also suspect because it prevented card issuers in one system from serving as agent banks in another. This observation, along with the Department's remark that the antiduality rule "might well handicap efforts to create new bank credit card systems," follows the final remarks of the Eighth Circuit in sending the dispute back for an evidentiary trial. See Worthen Bank & Trust Co., 485 F.2d at 130.

\textsuperscript{26} NBI Letter, supra note 19, at 2.

\textsuperscript{27} Id. at 2-3.
agent banks would resist changes that would not apply equally to both bankcards.

Still harder to explain is what the Department meant by “the existing competition between NBI and Interbank.” It is true that, during the year that the Department was studying By-law 2.16, both NBI and Interbank were working to develop EFT capability and to improve their in-house clearing mechanisms. The Department insisted, however, that it was talking about something else. In the very next sentence, it declared: “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 [against duality].” Furthermore, the Department rigorously divided its discussion of the by-law into two parts, and placed this passage in the portion that dealt with “traditional” or paper-based bankcard arrangements.

As long as both NBI and Interbank relied on an identical and static technology to deliver payment services, there was little that either bankcard group could do to differentiate its own services. Indeed, any differentiation might have reduced competition rather than increased it by encouraging merchants and cardholders to carry more than one card, even when the card services were essentially identical. At most, differentiation could help to create separate but parallel markets for the two bankcard organizations.

Whatever the rationale of the Justice Department letter, the underlying message was apparent: NBI could forbid duality among card issuers, but not among agent banks. This ruling amounted to a vindication of the original membership rules that Worthen had challenged four years earlier. The only major difference was that NBI could no longer prevent card issuers from acting as agent banks for the rival organizations.

This “partial duality” might have made sense in 1971, when paper interchange was the only available method for clearing bankcard data. But it no longer made sense in 1975, with EFT looming on the horizon. NBI had originally hoped to develop a unique set of standards for bankcards, terminals, and data communications among the NBI members — thus linking card issuers and agent banks in a common enterprise to deliver a unique service. When the Department insisted on duality for agent banks, however, it automatically created a large constituency for maintaining identical technology in the two systems. It would hardly have made sense for the agent banks to deploy two separate terminals and to maintain two

28. Id. at 2.
29. Id.
different sets of procedures for the two bankcard systems. At the same
time, the agent banks would be loath to give up the advantages of servicing
all the debit card business of their merchant clients. With the Justice De-
partment on their side, and with merchants lobbying for a universal termi-
nal that could handle both bankcards, agent banks were in a commanding
position to enforce their point of view.

Initially, NBI modified its by-laws to conform to the recommendations
of the NBI Letter. After a while, however, NBI apparently had second
thoughts about competing against Interbank in a world where all banks
could belong to both systems. NBI had confidence that its own methods
for clearing information among banks, and its inherent strengths as an or-
ganization, would give it an advantage over Interbank in servicing the
needs of card issuers and agent banks. In view of these considerations,
NBI decided to withdraw from the retail end of the bankcard business and
concentrate on the switching-and-transmitting end. Accordingly, NBI
opened its membership to all banks.

The demise of the antiduality rule has virtually guaranteed that the
bankcard industry will become highly interconnected and that bankcard
products will become comparatively standardized. So long as any distinc-
tion at all remains between bankcards, each card issuer has the incentive to
issue both cards to its customers. But neither the card issuers nor the agent
banks that handle both cards have any reason to treat the cards differently
for their own internal purposes. Accordingly, the industry seems to be
moving toward a single bankcard of standard size and shape, with a mag-
netic strip on its reverse side encoded with information meeting certain
industry-wide standards. Similarly, the trend seems to be toward a single
terminal that can accept and read both cards.

As the bankcards and the terminals have grown more standardized, the
clearing mechanism that acts as intermediary between the card issuers and
the agent banks has grown apart from the other components of bankcard
systems. Both NBI and Interbank already clear credit information among
banks without distinguishing which of the cards has been used in a trans-
action. Furthermore, the clearing industry has grown more competitive
and diverse. Third-party data processing companies, such as Tymshare
Transaction Services, have moved aggressively into the field.

The entry of third-party processors into the bankcard services field is a
most significant event. Financial institutions (and organizations of
financial institutions) have dominated the field and have naturally concen-
trated their efforts on their own highly specialized needs. Third-party
processors do not have to take so parochial a view. They can treat bank-
card clearing as just one communications service among many and use the same facilities to clear bankcard items as they use for transmitting other kinds of data.

It is not at all certain whether these third-party intermediaries have a cost advantage over "pure" EFT systems dedicated entirely to bankcard services. The third-party intermediaries may be able to spread their costs over a much higher volume of messages, but a "pure" EFT system may not require the same capacity or technical capability as a general-purpose data communications system. What is certain, however, is that the clearing mechanisms available to the bankcard industry are becoming more varied, more competitive, and more independent of the other parts of bankcard systems.30

III. MARKET-WIDE ACCESS AND INTERCHANGE ARRANGEMENTS

While the Department of Justice was considering the NBI case, it was also reviewing a bankcard scheme based on principles of "full duality": namely, the plan of the Nebraska Electronic Terminal System (NETS). NETS was an organization of commercial banks in Nebraska that wanted to establish a network of POS terminals and ATMs throughout the state. NETS was willing to accept any Nebraska commercial bank as a member and, in fact, hoped that all of them would join its system. But it refused to accept thrift institutions or out-of-state banks.31

Recognizing that a joint venture of this magnitude could raise competitive questions, NETS submitted its proposal to the Department of Justice for review, as NBI had done earlier. NETS filed its request on June 2, 1975. Almost two years later, after a series of changes in the arrangements among the NETS members, the Department refused to approve the NETS request. The Department said the venture was too large.32

The Department based its criticism primarily on the fact that NETS members collectively held over eighty-five percent of the commercial bank deposits in the state. The Department had no quarrel with the particular arrangements among the NETS members and did not claim that they were more restrictive than necessary to establish a bankcard system. On the contrary, the Department took special note that NETS allowed its members to develop specialized bankcard services on a competitive basis within

30. For an interesting and well-informed review of this entire matter, see Baker, Bank Card Systems are Not Immune to Antitrust Act, But Future is Unclear, AMERICAN BANKER, vol. 164, no. 192, at 5 (October 4, 1979).
31. NETS Letter, supra note 3.
32. Id.
the framework of NETS. Nor did the Department look upon NETS as an illegal attempt to monopolize the bankcard market. The Department recognized that Nebraska thrift institutions could offer competing bankcard services on their own. The gravamen of the Department's objections was simply that NETS was bigger than it needed to be:

We do not believe that the available evidence supports the necessity of an all-encompassing joint venture. Indeed, some evidence is to the contrary. A savings and loan association and several of the larger Nebraska commercial banks, acting alone, have either designed and operated EFT systems or are in the process of doing so. The degree of risk, the amount of capital required, and the economies of scale involved in constructing EFT systems — all of which are often cited as justification for joint ventures — do not necessarily suggest the need for a joint venture of the dimension of NETS.

The Department dismissed NETS' effort to preserve intrasystem competition among the NETS participants with the remark that: "NETS in effect will collectively define the range of EFT services available, which obviously retards individual system initiatives in designing competitively-based service offerings tailored to meet particular customer needs." The excessive size of NETS and the retardation of competition were the only two objections that the Department mentioned. Both amounted to the same thing: the Department thought that NETS members should form two or more smaller systems that would compete against one another on the basis of technological innovations.

The Department's objections to NETS do not stand up under scrutiny. For one thing, the NETS Letter contained no analysis of the demand side of the market for NETS' services. It is all very well to say that the degree of risk, the capital requirements, and the scale economies of bankcard systems — that is, the supply side of the question — do not intrinsically require banks to form massive joint ventures. On the other hand, if Nebraska cannot provide enough transactional volume to support more than one system, these supply-side factors are moot.

33. Id. at 2. See also Worthen Bank & Trust Co. v. National BankAmericard, Inc., 485 F.2d at 130.
34. NETS Letter, supra note 3, at 2.
35. Id. at 3.
36. The Department implicitly accepted NETS' assertion that the state of Nebraska constituted the appropriate geographic market for EFT services. The Department had no need to do more for its own purposes. But the assertion should not be accepted without question.
37. By mentioning "scale economies," the Department seems to imply that it had some notion of the range over which economies are to be calculated. It may equally be the case,
In addition, the Department’s Letter did not evaluate the competitive influence expected from the Nebraska thrift institutions, nor did it consider the possibility of entry by out-of-state systems. Even if most of the banks in Nebraska had joined NETS, out-of-state bankcard systems might still have been able to penetrate the Nebraska market by forming ties with the few banks (especially the large ones) that did not belong to NETS, and by allying with the thrift institutions excluded by NETS. Furthermore, out-of-state bankcard systems with only small local connections might have been able to compete effectively against NETS by emphasizing credit extensions rather than direct-debit services. The NETS members and the excluded institutions might not have been perfectly equivalent, but some competitive influence could have been felt.

Finally, the Justice Department came perilously close to implying that it considered NETS (and all other large-scale systems like it) illegal per se. As the Department asserted:

[W]e recogize that NETS can be a means of providing EFT services to all commercial banks in the state, regardless of size or location. On balance, however, and after careful analysis, we cannot conclude that these positive attributes outweigh the potential anticompetitive effects of the proposed joint venture.\(^3\)

The letter contained no estimate of the actual magnitude of these “positive attributes” in the Nebraska market. Accordingly, this passage is ambiguous at best. The Department’s internal analysis may have dealt with the special conditions prevailing in Nebraska, but the NETS Letter itself — the public statement issued to the world — spoke only of the type and character of the “positive attributes,” not their weight, thereby indicating that these “positive attributes” by their very nature would be inadequate to offset the competitive burdens NETS would impose.

On the other side of the scale, the Justice Department considered only one kind of detriment: that is, intra-NETS restraints. The NETS Letter did not consider the value of those restraints in the context of a market that might have included other systems. Competition from systems run by thrift institutions, or the chance for entry by outside bankcard systems, might not have reduced the anticompetitive effects of the NETS arrangements among the member banks, but such competition might well have however, that the Department only meant to say that EFT systems are not natural monopolies — that is, the Department may only be saying that the appropriate size for EFT systems (given an adequate volume of transactions) is small enough that small-scale joint ventures enjoy all the efficiencies of ventures the size of NETS. Because the Department put scale economies in the same list with the factors of risk and of capital requirements, the second interpretation would appear to be the correct one.

38. NETS Letter, supra note 3, at 3.
mitigated the overall anticompetitive effect on the market. In that case, the "positive attributes" of NETS might be deemed more valuable — valuable enough even to have justified NETS, provided the external competition was sufficient.

As written, however, the NETS Letter establishes a standard no large-scale bankcard system could ever meet. In effect, the Letter said that bankcard systems foreclosed competition among those who participated in them; that no "positive attributes" could overbalance these intragroup restraints; and that no factors apart from the intragroup restraints were to be considered. The logic of the NETS Letter would forbid all large bankcard systems from being formed, no matter how many other systems they might compete against.39

The real difficulty with the NETS Letter does not lie in its analysis, however, but rather in its vision of the bankcard industry. The Department of Justice implicitly assumed that each bankcard system is a unique entity with its own costs, its own scale economies, and its own special advantages over rival systems. Furthermore, the Department assumed that bankcard systems are designed for financial purposes and serve a financial market: accordingly, only banks would be interested in operating systems of this kind or would have the ability to do so. If competition were to be preserved, given these postulates, a number of systems would have to be created, each one formed by a separate group of banks, and each one independent of the others.

Had the NBI Letter never been written, the Justice Department might well have been able to rely on these assumptions and to carry forward its campaign for systems-level competition. For all its faults, the NETS Letter was fundamentally sound. It rested on a clear idea of the competitive forces at work in the bankcard market; its hypotheses about the nature of bankcard technology were accurate enough for the time, and it properly concentrated on promoting a favorable climate for innovation. Moreover, the NETS Letter's message — that the Department did not like market-wide systems — was simple enough and straightforward enough to provide an understandable guide to the public.

39. One must keep in mind that a Business Review Letter is not the same thing as a court ruling, or even as a decision by a regulatory agency. A Letter merely states the Department's present evaluation of the competitive effects of a proposed arrangement, and reveals the Department's present intentions on the question whether to bring suit against the parties to it. Nevertheless, many people are willing to give the Department's letters a broader significance. They react to a Letter as if it were in the nature of an interpretive ruling under the Department's "governing statute" — that is, the antitrust laws. Accordingly, the practical effect of a Letter is often the same as if it were in fact an interpretive ruling.
The bankcard industry might well be more competitive, and the consumers and merchants better served, in a world where bankcard groups are forced to compete against one another on the basis of the quality of their systems' delivery mechanisms. Each system would be forced to respond to the shifting needs of its customers — merchants and cardholders alike — as rapidly as possible, or find itself displaced by a rival system. Each system would be compelled to adopt new technology in order to stay abreast of its market. Furthermore, systems-level competition would offer the greatest opportunity for consumers to exert control over the banks producing bankcard services. Each consumer could (as many now do) carry several bankcards. When the consumer chose between competing stores — such as rival supermarkets — he could take their payment mechanisms into account in deciding where to go: that is, he could make his choice at least in part on the basis of how easy it would be to pay for his goods at the check-out counter. If a merchant found that his customers were going elsewhere because other stores' bankcard services were better, the merchant would have a strong reason to put pressure on the supplier of his own bankcard service, and the supplier would have the best of all reasons to improve it. In this way, consumers would be able to exercise a meaningful choice among bankcards and to have that choice make an impression on the banks producing bankcard services.

That was not to be the case, however. The NBI Letter reached the industry first. By the time the NETS Letter was written, the bankcard industry had already taken the first steps toward an entirely new structure. Duality had established a toehold; card-reading technology was beginning to standardize on the basis of magnetic-strip encoding, and the switching-and-transmission functions were already beginning to disengage from the card-issuing and terminal-deploying functions.

In the time since the NBI and NETS Letters were written, the bankcard industry has continued its metamorphosis. Technology in data communications has advanced. Companies that can provide services of this kind have proliferated and are willing to serve the financial industry as well as any other sector of commerce. It is no longer possible to look upon the bankcard industry as a separate and indivisible line of commerce, having its own cast of competitors and its own special characteristics. Today a bankcard system is really an agglomeration of many separate services, each of which is fairly independent of the others, and some of which extend far beyond the financial realm.

Perhaps the most significant change is that it is no longer true that arrangements like NETS "obviously retard" the growth of specialized or
competitive bankcard systems. Arrangements like NETS may indeed impose a more-or-less standardized technology for card-reading on the members of the group; that much is needed for interchangeability. But the standardization can end right there. Today a subgroup of banks might be able to deploy terminals with special capabilities and purchase clearing services for themselves from an independent source, and yet continue to belong to the market-wide system. So long as their terminals continue to accept the cards of other banks, and so long as they continue to interconnect with the other banks through the market-wide system, the subgroup can develop unique bankcard services without having to withdraw from the market-wide system.

The critical question is the cost of forming the alternative arrangement. That cost is much lower today where a vigorous and competitive data communications industry stands ready to clear bankcard information than it was in the early days of EFT when banks had to depend on their own technological resources. Moreover, the extra volume of transactions that the new terminals can handle by virtue of being connected to a market-wide system can help to justify their cost. Accordingly, arrangements like NETS might actually encourage innovation by reducing the cost and the risk of experimentation.

Market-wide arrangements can also help to promote competition in other ways — notably in price rivalry. Each bank must compete against every other bank for the patronage of each consumer and merchant. Moreover, every bank — no matter how small — can take advantage of the scale economies of the entire system to reduce its prices. The market price for service is likely to fall to the level determined by the common system’s endemic cost characteristics, and every bank would have the incentive to provide the highest quality service to its customers.

This line of analysis does not lead automatically to the conclusion that market-wide bankcard systems are immune to antitrust attack. If the arrangements are unduly restrictive, for example, or if the membership rules are discriminatory, or if the arrangements are being used as a cover for fixing prices or allocating markets, the participants could be exposed to liability. But it does suggest that bankers can pursue market-wide arrangements with a great deal more confidence than in the past. A plaintiff, such as the Department of Justice, will find it much harder to show that a market-wide system restrains competition to an unreasonable degree.
IV. **Federal Reserve Participation in Bankcard Operations**

If market-wide bankcard systems are not synonymous with a reduction in competitive vigor, these systems can be considered in the context of other kinds of EFT mechanisms — notably the Federal Reserve's ACH operations. The Federal Reserve does not currently process very many bankcard transactions through its ACHs: The ACHs, being off-line, do not lend themselves to this sort of task. Accordingly, bankcard clearing systems have developed apart from and parallel to the Federal Reserve's facilities.

It may no longer make sense to insist on keeping a sharp line between Federal Reserve operations and bankcard services, however. The Federal Reserve has recently begun to upgrade its data communications network to full on-line capability. When this changeover is complete, the Federal Reserve's ACHs may have scale economies that can be realized more fully when bankcard volume is processed through them. Conversely, some kinds of bankcard services might be made cheaper if they can take advantage of an ACH's extra capacity.

The economic objections to this kind of arrangement are threefold. It is said that it is improper and unnecessary for the Federal Reserve to spend its resources clearing bankcard items when private businesses stand ready to do so. It is also said that the Federal Reserve's mere presence in the bankcard field is objectionable because, being immune to the normal kind of business pressures that affect a private sector competitor, the Federal Reserve distorts the market for bankcard clearing services. Finally, it is argued that the Federal Reserve cannot really be expected to price its clearing services properly, no matter how hard it tries. If the services are priced too low (as seems likely), private competitors will be deterred from entering the field, and banks will overinvest in services that employ the Federal Reserve facilities.

The first two points are not really debatable on economic grounds. They amount to a policy conclusion that antitrust considerations should outweigh other factors. Nevertheless, there are several affirmative reasons for the Federal Reserve to provide support to bankcard services. Bankcard

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40. The essence of a point-of-sale EFT payment is that verification of the customer's ability to pay, and the payment itself, are both completed at once. Sending an item through an off-line ACH entails a substantial delay, and destroys the advantage of risk-free, on-the-spot payment.

41. The Federal Reserve has issued a proposed schedule of prices for its services, including its ACH services, as required by DIDMCA § 107. See Federal Reserve Bank Services; Proposed Fee Schedules and Pricing Principles, Docket No. R-0324, 45 Fed. Reg. 58,689 (1980) [hereinafter cited as Pricing Proposal].
services are a part of the national payments mechanism: they may require a different kind of apparatus from that needed to clear traditional paper items, but, in the end, they perform the same basic functions as paper instruments.

Perhaps the two most important qualities of the traditional payments mechanism are its universality and reliability. If the Federal Reserve were to provide clearing facilities for bankcard services, these services would acquire the same qualities. The very fact that the Federal Reserve is not a private company provides an extra measure of assurance that electronic clearing facilities will continue to be available for this purpose. In sum, while there might be certain costs in having government-operated clearing systems of this kind — perhaps even higher costs than would be the case if only private companies were to clear bankcard transactions — there are certain public benefits as well. At bottom, the decision to have a government-operated EFT network is a political one in which economic considerations must be balanced against other values.

The last point — namely, that the Federal Reserve is likely to upset the bankcard market by underpricing its bankcard services — is a straightforward economic argument, but one that has much less force today than in the past.42 It is true enough that one cannot expect the Federal Reserve to set its prices exactly as a private-sector competitor would. As the Depart-

42. Before the adoption of DIDMCA, the Federal Reserve might have been able to look upon its prices as being mere administered fees, set for purposes that could be identified by the effects they produced. Under this view, the Federal Reserve would pay the entire costs of operating its ACHs out of general revenues. It would then set its prices with the object of achieving a broad spectrum of public interest goals, of which recovering costs and promoting competition would be only two among many. This kind of pricing scheme might not be particularly successful in allocating resources efficiently. It might, however, produce public benefits of a much different nature from those that a market-oriented schedule could generate: most notably, the public benefit of encouraging banks to belong to the Federal Reserve System. The decision to emphasize these other kinds of benefits at the expense of competition and efficiency in EFT services is essentially political in character, and — like the decision to have a federal presence in the EFT industry at all — not confined to the realm of antitrust policy.

Under DIDMCA, however, this approach to price setting is no longer available. The new law requires the Federal Reserve to cover the fully allocated costs of providing services out of the prices it charges for them (with some qualifications). See DIDMCA § 107. There is bound to be some argument over what costs should be considered and what kinds of projections are reasonable to make. But the basic fact is that the Federal Reserve must base its prices on economic factors; it may not ignore economics in favor of other considerations. Accordingly, it is fair to judge the Federal Reserve's prices by their influence on the market for clearing services and on any derivative markets that might be affected by the character of the clearing industry, notwithstanding the possibility that a price which seems improper or uneconomic might serve other public interests.
ment of Justice has pointed out, the Federal Reserve is likely to be subject to a variety of pressures when it comes to establishing rates:

Our experience with rate regulation in the public sector suggests that the Board will be under constant pressure to adjust fees in order to accommodate non-economic influences. Special interests will ask for special considerations. Member banks may ask for extra benefits and low rates; those who face peculiar competitive circumstances may plead for favorable treatment; large institutions with many items may request rates that are volumesensitive while institutions close to the ACH may ask for rates that are sensitive to distance; smaller and more remote institutions may demand equal treatment. Resisting the pressures of special interests will not be easy.43

Furthermore, as the Department has noted, the Federal Reserve will be compelled "to establish some form of supervisory authority in order to prevent discriminatory and uneconomic pricing mechanisms from coming into being."44 Any such bureaucracy will entail extra administrative costs and will generate added delays in making price changes. These costs are peculiar to the government. Private-sector companies do not have to respond to outside pressures in the same formalized way that government agencies do; it is all too easy for those who benefit from an out-of-date price to use the administrative process to delay its modification. A proper pricing scheme should take these added costs into account.

If the Federal Reserve is not willing to recognize the special burdens that go with its status as a government agency, it is quite ready to accept any benefits that derive from it. For example, in its proposed fee schedule for check-clearing and ACH services, it estimates the cost of capital and debt at rates below those available to private companies, and far below those available to newer and smaller companies that might like to enter the field. It also assumes that it will enjoy a nearly total penetration of the market for ACH-divertible items. Private sector companies would be unable to predicate their charges on either of these assumptions; their charges per item might have to be somewhat higher, and their market penetration correspondingly lower. In sum, the Federal Reserve's prices are likely to be improperly low, and to some degree anticompetitive.45

43. Comments of the Department of Justice at 11, Collection of Checks and Other Items by Federal Reserve Banks, supra note 3.
44. Id.
45. The Federal Reserve bases its schedule on three sets of figures: its own historical costs for assets; its projections of ACH volumes; and its 1979 figures for the costs of long-term debt, short-term debt, and after-tax return on equity. Each of these sets of figures seems to contain a bias toward the low side, with the result that the fees are likewise low.
The prospect that the Federal Reserve will underprice its services might

First, the historical costs of assets are likely to be lower than the replacement costs — that is, lower than the costs a would-be entrant would have to incur using new equipment. In addition, the Federal Reserve seems to calculate the costs of "assets employed in the production of priced services" improperly. It determines the ratio of expenses incurred in providing priced services to total System costs (43.2%; but no cost figures are given). Then it applies the ratio, not to total System assets (also not given), but only to mixed-service assets — that is, to assets used in producing both priced and nonpriced services ($659.5 million). Presumably the ratio of priced-service expenses to mixed-service expenses would be higher than 43.2%; and the proper estimate for the priced-service assets would be larger than the $284.9 million given by the Federal Reserve. See 45 Fed. Reg. at 58,695.

Second, the Federal Reserve candidly admits that "the fee schedule proposed for ACH services reflects System costs in a mature volume environment," and that it has used this approach in order "[t]o encourage the development of electronic funds transfer." 45 Fed. Reg. at 58,691. In other words, right from the start the Federal Reserve has based its fees on the highest volume of ACH items it can ever expect, not on the volume that a prudent businessman would have to estimate for the next year or two. The Federal Reserve further inflates its estimated volume by making no provision — or at least not acknowledging any provision — for the competitive impact of other EFT systems. Presumably some of the items now flowing through the check-clearing system will be handled, not by the Federal Reserve's ACHs (even when upgraded to on-line capability), but by independent EFT networks. Anyone planning to offer clearing services in competition with the Federal Reserve's facilities would have to make a calculation of this kind — and of course would have to estimate the volume of ACH-divertible items that the Federal Reserve would retain. In short, the Federal Reserve is using its monopoly position to justify a schedule of prices that seems unreasonably low, and which will entrench its monopoly all the more strongly.

Third, the Federal Reserve's figures for the cost of debt (long-term, 7.98%; short-term, 6.91%) and for the after-tax return on equity (14.4%) are much too low. See 45 Fed. Reg. at 58,695. The Federal Reserve says these figures represent average 1979 costs at twelve large banks. The Federal Reserve then uses these figures to derive the "private sector adjustment" by applying them to a capital structure "assumed to approximate that of a private business firm solely providing payments function services: 53% debt (32% short-term, 21% long-term) and 47% equity." Id. The Federal Reserve does not explain these figures in any detail; for example, it does not say whether the "short-term" debt includes long-term paper within a year or whether the rate represents a five-year average of short-term rates. Nor does the Federal Reserve explain why bank-derived figures are appropriate in calculating the costs attributable to a nonbank enterprise. Nevertheless, using this analysis the Federal Reserve comes up with a private sector adjustment factor of 12%.

By contrast, a recent study by Koot & Walker, which examined 123 bank service corporations, suggests a much different picture. Koot & Walker found that the capital structure of these corporations was close to the estimate used by the Federal Reserve: they put the debt-to-assets ratio higher (56.2%) and the equity-to-assets ratio lower (43.8%), but noted that the firms' individual reports varied considerably. Koot & Walker further noted that many of these firms pay about 1% above the banks' prime interest rate for their debt. They also found that the median after-tax return on capital for the firms was 21.5%, a far cry from the Federal Reserve's 12-bank average. See Koot & Walker, The Mark-up in Pricing of Federal Reserve Services 4 ISSUES IN BANK REGULATION 21 (1980); see also Koot & Walker, On the Mark-Up in Pricing of Federal Reserve Services (March, 1980) (unpublished paper on file at the Federal Deposit Ins. Corp.) Using current market prices for debt (short-term 11.5%; long-term 13.5%) without the premium urged by Koot & Walker for small borrowers, using Koot & Walker's estimated pretax median return on capital for bank service corporations (28.7%), and using the Federal Reserve's own methodology — including perforce its ultra-
once have been sufficient justification for keeping the Federal Reserve out of ACH operations, and more than sufficient reason to block its processing bankcard items. However, the Federal Reserve no longer poses so great a threat to the development of competitive and efficient EFT systems. The most important difference is that the data communications industry has come into its own. Companies in this field continue to generate new kinds of services that can be adapted to the needs of the financial community. Accordingly, the Federal Reserve’s prices, even if artificially low, do not constitute a bar to innovation in EFT technology. Innovation goes forward in parallel markets where the Federal Reserve does not intrude.

To some extent, of course, artificially low prices may constitute a barrier to entry by data communications systems into the EFT market. So long as the Federal Reserve’s prices are not too far off the mark — that is, so long as the prices represent a good faith attempt to reflect the Federal Reserve’s actual costs — the barrier is not likely to be very high. For one thing, costs of data communications and data processing have been declining, and their quality has been improving. For another, rival systems may be able to take advantage of scale economies deriving from their nonfinancial data communications business. At the very least, it seems clear that the Federal Reserve’s pricing would be less of a deterrent to communications companies which have other markets to serve than it would be to financial institutions. Besides, the potential entrants are no lightweights: many, notably Bell Telephone and GTE Telenet, have ample resources of their own.

It is also possible that, if the Federal Reserve sets its prices artificially low estimate for priced-service assets — the private-sector adjustment ought to set at 18.4%. Any upward shift in the estimate for priced-service assets would have a proportionate effect on the adjustment factor.

In sum, the Federal Reserve’s estimated costs and proposed adjustment factor seem too low, while its estimated volume seems too high. Under these conditions, the fees themselves are improper and anticompetitive.

46. In a parallel case, the Federal Reserve has not charged any fees for clearing paper checks. This policy may have delayed the coming of ACH technology in two ways: first, by deterring banks from building their own ACHs as soon as they became economical; second, by making it harder for ACHs to cost-justify themselves in any but the very largest markets. The reason for this is that, so long as the Federal Reserve holds check-interchange costs at zero, ACHs cannot save banks any money, at least not for interchange itself. The ACHs may make it possible for them to streamline their own back-office procedures for handling payment items, but the total savings on each item is smaller than it would have been otherwise. Accordingly, the banks would have to divert an exceptionally large volume of items through an ACH in order to save enough in other ways to pay the costs of building and running it. This effect reinforces itself: the higher-than-otherwise volume requires a larger-than-otherwise ACH to handle it, which in turn requires an even greater volume of ACH-divertible items to sustain it. The result is that the break-even point, in terms both of volume and of investment, is increased to more than it would have been had the Federal Reserve charged an appropriate fee for its check-clearing services.
low, banks will overinvest in the services (including bankcard services) that depend on ACH processing. But EFT services are very new; it will be a long time before they grow beyond the point of optimum use and banks can be said to be misallocating resources in any long-term sense. Moreover, so long as the Federal Reserve comes reasonably close to charging cost-based prices, the banks' investment in ACH-dependent services is bound to stay within reasonable limits.

As a matter of policy, however, it would be best for the Federal Reserve to set its prices on the high side rather than on the low. Overpricing will not only encourage private companies to enter the market for bankcard clearing services, but will also reduce the amount of resources that the Federal Reserve has to commit to this field since the Federal Reserve's facilities will not have to handle such high volumes of items. Moreover, higher prices will also help to compensate for some of the more inchoate costs of governmental intrusion, such as the increased costs of decision-making.

V. GEOGRAPHIC LIMITATIONS ON BANKCARD TERMINALS

The rules that govern the use of remote bankcard terminals are not uniform. The states have their own rules, which apply only to state-chartered institutions, and which vary from one state to the next. The federal rules are almost as diverse. The National Credit Union Administration's rules are apparently quite liberal, as they allow federal credit unions to establish bankcard terminals wherever they like, without giving prior notice.\footnote{47} Federal savings and loan associations may establish bankcard facilities throughout their home states, but not across state lines, and in any event not more than five miles from a brick-and-mortar branch.\footnote{48} National banks have the strictest rules of all. They must comply with the McFadden Act\footnote{49} which requires them to conform to state branching laws when offering bankcard services through remote EFT terminals.\footnote{50} If a state has special rules for terminals, however, they are considered part of the state's "branching laws," and national banks enjoy the same privileges as state banks.\footnote{51}

\footnote{50} The McFadden Act restricts check-paying, loan-making, and deposit-taking facilities. \textit{Id.} All bankcard terminals perform at least one of these functions, and any one function is enough to bring a bankcard terminal within the McFadden Act's restrictions. \textit{See} Independent Bankers Ass'n v. Smith, 534 F.2d 921 (D.C. Cir.), \textit{cert. denied}, 429 U.S. 862 (1976).
\footnote{51} 534 F.2d at 948-49 (dictum).
Many observers believe the McFadden Act's limitations are too restrictive for EFT technology. The National Commission on Electronic Funds Transfer (NCEFT), for example, called upon Congress to adopt a new and entirely separate set of rules for EFT services — rules that would apply uniformly to all institutions. The NCEFT recommended that any institution be eligible to deploy EFT terminals throughout its home state and throughout "natural market areas" that it serves, even when the market areas cross state lines.52

Those who endorse controls on bankcard terminals assert that the terminals could give big banks a tremendous advantage over small ones. They point out that the terminals perform most of the basic functions of full-service branches: customers can deposit money into them, withdraw money from them, borrow money through them from an established line of credit, use them to transfer funds from one account to another, and perform many other regular transactions. Accordingly, in their view, the same controls are needed for bankcard terminals as for full-scale branches. Otherwise big banks could flood the markets of their smaller rivals and penetrate new markets from which state laws and the McFadden Act are designed to exclude them. Ultimately, the banking industry could be dominated by a few nationwide chains of money-center banks. Smaller banks would either be absorbed into the chains or fail.

Those who disapprove of the controls on bankcard terminals reject all these claims. They argue that bankcard terminals have entirely different competitive effects from those caused by full-scale branches. Terminal networks do not represent a significant threat apart from full-scale branches, because too many aspects of bankcard service require personal contact between the banker and his client.53 Accordingly, there is no reason to have special restrictions on the terminals themselves. The branching restrictions automatically limit the scope of any bankcard network.

Moreover, say these critics, bankcard systems have scale economies that can only be realized if the systems can serve multistate markets.54 Many local markets (even statewide markets) simply do not have enough volume to sustain several competitive systems. Banks should be allowed to deploy terminal systems throughout a region and be able to compete head-to-head

in each local market within it. Banks could then serve merchants in other states (as they do now by mail), and could compete for the EFT business of multistate chain stores. In addition, banks could serve their cardholders in places where natural market areas cut across state lines.

Finally, these critics deny that big banks will drive the smaller ones out of business. They point out that small banks are often well-established in their local markets and have built-in advantages in competing against out-of-area rivals. They note that the cost of deploying terminals and issuing cards is low enough for smaller banks to offer bankcard services of their own. Indeed, EFT capability may even be more valuable to a smaller bank than to a larger one, as the costs of expanding service by use of EFT are lower than those of expanding by full-scale branches. Small banks can cut their bankcard costs still further by forming joint ventures with other banks in the area. Besides, say these critics, banks that operate big bankcard systems are more likely to court small banks for business they can bring to the system than to try to drive them from the field. In addition, if the ordinary forces of competition are insufficient to guard small banks against predatory practices, the small banks can invoke the antitrust laws.\textsuperscript{55}

Whatever the merits of these opposing claims, they lose much of their force in the context of a third-party clearing arrangement. In \textit{Independent Bankers Ass'n v. Smith}, Judge Wilkey drew a distinction between facilities “established (\textit{i.e.}, owned or rented) by a bank” and facilities established by third parties.\textsuperscript{56} The former would qualify as branches; the latter would not. Federal regulators have seized on this point in their rules for shared bankcard terminals. The Comptroller of the Currency and the FDIC both indicate that a bank needs to make a formal branch application for a terminal, pursuant to the requirements of the McFadden Act, only when the bank owns or leases the terminal itself.\textsuperscript{57}

This approach — if it survives challenge\textsuperscript{58} — opens the door to full re-

\textsuperscript{55} See generally NCEFT \textit{FINAL REPORT} 103-11, 133-34.
\textsuperscript{57} Id. at 951.
\textsuperscript{59} In the \textit{Independent Banker's Ass'n} case, Judge Wilkey stressed the broad language and fundamental policies that the Supreme Court articulated in \textit{First Nat'l Bank in Plant City v. Dickinson}, 396 U.S. 122 (1969). He insisted that private arrangements should not control the question whether a bank is offering banking services — receiving and disbursing funds — to its customers, in any given spot, and doing so through facilities that give the bank a competitive edge over its rivals. It is equally true that Judge Wilkey emphasized the matter of responsibility for the terminals, which he framed in terms of ownership or control.
gional EFT systems. Any bank could buy intermediary services from a third party and conform to the standards for access and interchange established by that company. It could then issue cards compatible with the terminals deployed by others using that company’s services—merchants and banks alike. It could also permit other banks’ customers to use its own terminals. There would be no suggestion of an implicit responsibility for one bank’s terminals on the part of another, as there might be if the banks worked together to form a system themselves.6

Furthermore, the economic arguments on both sides are much weaker when banks can purchase intermediary services from third parties. A small bank can defend itself against a large bank that is trying to invade its market because the small bank has access to EFT clearing mechanisms that are every bit as advanced and as widely used as those of the intruder, and can use them to offer EFT services in a market where it has already established itself. Conversely, however, the branching laws do not prevent the growth of scale economies in EFT systems. The intermediaries have their own scale economies, which are determined by their own costs and overall volume (perhaps including nonbankcard items). The intermediaries might be able to process transactions for several local bankcard systems, all of which conform to state branching rules, and still offer the advantages of consolidated volume to each of them.

For all this, it remains true that the McFadden Act and IBAA v. Smith put constraints on proprietary EFT systems, including systems jointly owned by several banks. To that extent, the branching laws may still generate higher prices, not by affecting the cost structure of the bankcard systems, but by limiting competition among them. But the magnitude of this effect is hard to gauge, and in any event is likely to be fairly small. The laws restricting brick-and-mortar branches are (for the moment at least) an established part of the landscape of banking. If proprietary bankcard terminals cannot exert much influence apart from a supporting network of

A later court, however, might well look upon the matter of responsibility a bit differently: it might focus on the special competitive benefits accruing to a bank that can deliver services to its customers through a terminal, notwithstanding the fact that someone else owns or controls it. As Judge Wilkey pointed out, the basic question is one of federalism. 534 F.2d at 932-38. If banks use Judge Wilkey’s own-or-rent test to carve a loophole in the dual-banking system, later courts may close the loophole by giving a broader meaning to the concept of “establishing” or “supplying” a bankcard facility. 60. Actually, arrangements of this kind have occurred already. At least one bank issues cards to customers of other banks, and allows the customers to withdraw cash from its ATMs. It recovers the funds by presenting debits to the banks through the ACH. The customers, on their part, preauthorize their own banks to honor the debits, but there are no special agreements between the card-issuing bank and the banks where the customers hold their deposits.
brick-and-mortar branches, the extra anticompetitive effect of applying the same standards to EFT terminals must be close to zero.

Achieving scale economies and promoting competition among banks are not, however, the only goals of antitrust policy in this area. The basic object of the antitrust laws is to see that the nation's resources are used as efficiently as possible. Accordingly, it is important to consider the extra costs that users of bankcard services, both consumers and merchants, incur as a result of any deployment restrictions on EFT terminals. These costs do not always show up directly in the price or quality of service. They can take more subtle forms, such as added inconvenience, or restricted choices, or altered patterns of behavior.

So long as the "owned or leased" test prevails, these extra-bank effects are likely to be small because the test is so easy to conform to. But if the courts take a broader view of the McFadden Act — for example, if they emphasize the competitive presence that a bank can achieve in a market by means of an EFT terminal — the deployment restrictions could make quite a difference to consumers and merchants. In that event, a consumer would not be able to use a bankcard at an EFT terminal if his bank would be ineligible to deploy its own terminal at that location: the use of the bankcard would qualify as either "paying a check" written by him or "making a loan" to him. Instead, he would have to use some other method of payment — a check, a credit card with paper documentation, or cash — that he might have preferred not to use. The merchant would suffer the extra costs of slower checkout procedures. The costs of having EFT terminals in his store — lost shelf space, employee training expenses, monthly service charges, and so on — would seem proportionately greater if his customers were to use the terminals less often.

Of all payment vehicles, only bankcard services would have to endure these demand-side costs. There are no equivalent restrictions on the use of cash, checks, or ordinary credit cards. Accordingly, the overall effect of the terminal restrictions would be to tilt the balance away from bankcard services toward other payment vehicles — a tilt away from the most efficient mix of services, and a tilt away from the services that give the greatest promise of long-term savings for the nation.

Whatever the fate of the "owned or leased" test, there will always remain the costs and delays of following regulatory procedures, plus the

62. Independent Bankers Ass'n v. Smith, 534 F.2d at 945, 948.
63. Federal banking regulators have taken steps to minimize these costs and delays. See, e.g., 12 C.F.R. § 303.14(l).
costs of maintaining a bureaucracy to enforce them. Costs of this kind should not be taken lightly. The Community Reinvestment Act,\(^\text{64}\) for example, can provide a major obstacle to terminal deployment. The Act requires that, whenever a bank applies for permission to establish a "branch or other facility with the ability to accept deposits,"\(^\text{65}\) the bank's federal supervisor must assess its record in meeting the credit needs of its community, and particularly of low-income people who live there.\(^\text{66}\) Accordingly, bankcard terminals can be held hostage to other federal objectives, such as seeing that banks make enough mortgage loans to people in their communities. This kind of pressure may help carry out the purpose of the Community Reinvestment Act, but it does not do much for consumers of bankcard services: they must bear the extra costs of compliance, and they must do without the services when banks are found wanting.

In view of the residual arguments in favor of deregulating bankcard terminals, the question becomes whether there are any other public goals to be served by retaining the terminal restrictions. For full-scale branches, of course, there are several policy reasons for retaining control over the location of bank facilities. For example, one purpose behind the branching laws is to preserve a vital dual banking system in which state governments enjoy a significant degree of control over local banking conditions. Another is to ensure that banks remain sound, stable, and responsive to community needs.

These policies, however, do not provide any compelling reason to impose a separate set of geographic restraints on bankcard terminals. If bankcard terminals by themselves do not disturb banking unduly, it seems unlikely that states would lose their power to control those markets, even though out-of-state institutions are able to use the terminals and accept deposits through them. Nor is a state likely to lose the power to supervise the institutions that it charters merely because those institutions serve some out-of-state customers by means of EFT terminals. Finally, even the goal of maintaining a stable and responsive banking industry does not require control over the location of bankcard terminals, but only control over the level of investment that a bank commits to this kind of service.

It must be conceded, however, that the residual arguments for deregulating EFT terminals do not have the same urgency as the competitive arguments once had. The best course might well be to end all federal controls on bankcard terminals and to allow market forces to prevail. On the other


hand, the rules do not appear to exert a very powerful effect on resource allocations or to impose extraordinary costs on the nation. It might be equally wise to leave things as they are and allow bankcard services to develop without severe legal shocks and uncertainties. The worst course of all would be to tinker constantly with the rules in the hope of striking some ideal balance among competing objectives.

VI. Compulsory-Sharing Laws

Many states have adopted special rules to govern the sharing of bankcard systems. These laws generally provide that, when institutions operate facilities in support of their own bankcard services, they must agree to make the facilities available to other institutions on fair and nondiscriminatory terms. But the rules differ widely from state to state. For example, some limit the sharing requirement to institutions of the same kind. Other states impose the sharing requirement only on terminals more than a certain distance from the institution that deploys them. Still others require sharing of some kinds of facilities (such as point-of-sale terminals) but not of others (such as ATMs).

Supporters of these state statutes see them as a simple yet effective way to prevent large banks from swamping smaller ones. They believe that the laws will make it easier for the smaller banks to gain entry into the bankcard field and help make the market for bankcard services more competitive. At the same time, they also expect that the laws will help to maintain the safety-and-soundness of smaller banks in a world where bankcard services are an important competitive weapon. The laws, as seen by their supporters, prevent large banks from using their dominance over one set of banking services (demand and savings accounts) to extend their power into a separate but related area (bankcard services).

Many observers object to the principle of compulsory sharing, however, and believe Congress should nullify the state laws and preempt the field. They argue that the sheer multiplicity of laws prevents bankcard services from developing properly throughout a region. In addition, they contend

67. See, e.g., IOWA CODE ANN. § 527.5 (Supp. 1979) (West) (requiring commercial banks to share satellite terminals with other commercial banks; savings and loan associations to share with other savings and loan associations; and credit unions to share with other credit unions).

68. See, e.g., N.C. AD. CODE ch. 3C, § 1500 (1979) (no state bank may deploy an ATM more than 50 miles from its home office or nearest branch without making the ATM available to local institutions).


70. The NCEFT adopted this position. NCEFT FINAL REPORT at 97-98.
that the laws deter innovation and entrench dominant banks. Small but
innovative institutions are stifled because, whenever they want to intro-
duce a new idea, they have to make it available to all their rivals. These
critics also say that the sharing laws build in a legal bias toward large
general-purpose systems and against small and more specialized ones. Fi-
ally, the critics charge that compulsory-sharing laws may appear simple
in concept, but are extremely difficult and expensive to administer. Banks
will inevitably disagree on the terms and conditions of admission to an
operating bankcard system: the state banking agencies (or the courts) will
be clogged with disputes.

It is apparent that the debate on the issue of compulsory sharing has a
great deal in common with the debate on market-wide bankcard systems.
The two debates are rooted in the same soil: namely, the idea that banks
alone are involved in the production of bankcard services. Just as in the
case of the debate on market-wide systems, however, changing technology
is eroding the ground of the discussion. On one side, small banks do not
need the protection of compulsory-sharing laws when they can be sure of
gaining access to powerful, well-established clearing networks that serve
many banks. On the other side, there is no longer much reason to fear that
the compulsory-sharing laws will deter innovation in clearing techniques
or in bank services. The clearing intermediaries are subject to strong com-
petitive pressure in their own line of commerce: they must continue to
improve themselves.

There are other reasons for believing that the debate over compulsory-
sharing laws has lost much of its urgency. For one thing, it seems likely
that federal antitrust laws override the state sharing requirements in cases
where they come in conflict. That is to say, although banks might have to
make their facilities available to newcomers, the newcomers may be barred
from taking advantage of the offer if the resulting arrangement would vio-
late the antitrust laws.71 For another, it is not at all clear that federally
chartered institutions are bound by the compulsory-sharing requirement.
Neither federal credit unions nor federal savings and loan associations are
subject to any state controls over the location of bankcard terminals or
over the nature of the services that can be offered through them. Nor has

71. Because the newcomer has the option to join an established system or to form one of
its own, the necessary element of "active state supervision" is missing. See California Retail
Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 48 U.S.L.W. 4238 (March 3, 1980); see also
Cantor v. Detroit Edison Co., 428 U.S. 579 (1976). Moreover, states cannot authorize pri-
ivate parties to engage in conduct that would violate the antitrust laws unless Congress has
explicitly conferred that power on the states. See Schwegmann Bros. v. Calvert Distillers
any court suggested that the principle of "competitive equality"\textsuperscript{72} applies to the relation between federal and state thrifts. Even in the case of commercial banks, the principle of "competitive equality" seems limited to parity in the matter of location and capitalization of bank facilities.\textsuperscript{73} The McFadden Act has never been interpreted to mean that states can compel national banks to share branch offices with their rivals.

All in all, the national interest in preemption now appears much less powerful than it might once have seemed. If anything, the federal interest has shifted around to the other side of the question. To the extent that compulsory-sharing laws merely express state policy regarding the operations of state-chartered institutions, the laws represent the exercise of state authority under the dual banking compromise. The federal interest lies with safeguarding the states' sphere of influence, at least on this score, because doing so helps promote the federal policies of community responsiveness, states' rights, and local control over the financial sector.

At the same time, however, states may be starting to have second thoughts about compulsory-sharing laws. Although federally chartered institutions may not have to comply with state laws themselves, they may nevertheless be able to use the laws against their state-chartered rivals. A group of federal savings and loan associations, for example, may be able to deploy their own terminals and provide their own clearing services for an EFT system, and still be able to exclude state institutions (subject to antitrust constraints, of course). Yet the members of the group may also be able to demand access to any bankcard facilities that the state institutions might deploy on their own.

In addition, state laws commonly focus on the duties of agent banks, not card-issuing banks, an approach that can put a heavy burden on local small-town banks. Nebraska, for example, explicitly requires established agent banks to designate a clearing entity to which they will deliver transactions.\textsuperscript{74} Nebraska also puts agent banks under a duty to see that the designated intermediary will deal with newcomers.\textsuperscript{75} It is easy enough for agent banks to comply with this rule when they control the intermediary. It is much more difficult for them to do so when the intermediary is an independent company. The intermediary may have its own reasons (perhaps antitrust reasons) for refusing to interconnect with a large card-issuing bank.

\textsuperscript{73} See 12 U.S.C. § 36(c) (1976).
\textsuperscript{75} Id.
ing bank that wants to enter the market, particularly if the bank has its own EFT system elsewhere.

Furthermore, many state laws are much less detailed than those of Nebraska. In many cases it is not clear where the agent banks' obligations — and their control over the arrangements — ends. On one hand, if the agent banks have no duty to see that an intermediary stands ready to deal with newcomers, the laws would mean very little. On the other hand, if the laws are read to mean that a new card issuer could designate his own intermediary, and compel small agent banks to work out arrangements with it, the laws could impose significant costs on the small agent banks. More to the point, compulsory sharing was intended to protect the smaller banks, not force them into this kind of position.

For all these reasons, it seems likely that the compulsory-sharing laws will wither on the vine over the next several years. There appears to be little reason to insist on nullifying them and committing the area to federal control. So long as the sharing requirement does not interfere with federal interests, there does not seem to be any immediate need for the federal government to preempt the state laws.

VII. SOME NEW ISSUES IN BANKCARD SERVICES

As the earlier issues fade, new ones arise to take their place. Some are traditional antitrust questions that have a special twist to them because they arise in the context of the bankcard industry. It is possible, for example, to look upon a direct arrangement between a bankcard organization and a retailer as being a misuse of pooled power on the part of the banks that make up the organization.76

Other issues involve competitive questions that seem new only because they arise outside the field of bank supervision. For example, the Post Office has expressed an interest in offering electronic mail services.77 The debate on this matter has much in common with the debate on Federal

76. National Bankcard Corp. has recently brought suit against VISA, Inc., challenging an arrangement between VISA and a major retailer under which the retailer would be eligible to issue VISA cards of its own. National Bankcard Corp. v. VISA, Inc., Civil No. 79-6355 (S.D. Fla., filed June 21, 1979). At one time the Department of Justice also considered challenging Interbank's interchange fees as being a form of price fixing. But see Fisher v. First Nat'l Bank, 548 F.2d 255 (8th Cir. 1977) (where the Eighth Circuit, relying on its own decision in Worthen Bank & Trust Co., rejected a claim that the members of a bankcard system were engaging in price fixing).

77. The United States Postal Rate Commission has recently issued an opinion regarding a proposal of this kind made by the United States Postal Service. See Opinion & Recommended Decision Upon Reconsideration, Electronic Mail Classification Proposal (1978), U.S. Postal Rate Comm'n, Docket No. MC 78-3 (April 8, 1980).
Reserve ACHs. But where it might be reasonable for the Federal Reserve to operate ACHs, and even to clear bankcard items through them, it would be a mistake to give the Post Office a free hand in the broader field of electronic communications. The Post Office could exert a chilling effect on the development of new data transmission techniques and services; the bankcard industry (along with many others) would suffer the consequences.

The Bell System has also expressed an interest in offering new kinds of telecommunications services, particularly services that entail a heavy use of data processing techniques. At the moment, the Bell System is prevented from moving very far in this direction by the terms of its 1956 Consent Decree agreement with the Department of Justice. The Bell System would like to relax the Decree in order to gain more flexibility in providing advanced kinds of telecommunications services. The banking industry ought to be wary of this initiative. The Bell System's services could overlap with, and compete against, the more specialized EFT services offered by banks. Moreover, the Bell System's overwhelming competitive power would give it a strong advantage.

The most important issues, however, may be those that proceed from the growing coalescence between "banking" services — particularly payment services — and other data processing and telecommunications functions. The advent of EFT technology has made the payments mechanism vastly more flexible and efficient. Banks no longer have to deal with an irreducible paper document containing all the information that any bank might need, nor must they wait their turn to process it. Instead, the document can be replaced by a series of direct messages, each containing just the information that any bank might need in order to carry out its own part in the transaction.

This change does more than merely streamline the payments mechanism. It also makes it possible to integrate payments information with the wealth of nonfinancial data that businesses exchange with one another in the course of a transaction, but which have historically moved through other channels: data such as shipping instructions, invoices, government documentation, and so on. Gathering these streams together in a broad-
ranging communications network could make the entire flow of commercial information more efficient. It could also lead to entirely new kinds of services and arrangements. For example, a shipper might be able to exercise much greater control over the movement of goods without diminishing the security or disturbing the interests of intermediate parties. In the bankcard field, banks might be able to offer new kinds of cash-management and household inventory-control services to consumers.

Unless banks obtain wider powers, however, they may not be able to produce services of this kind themselves. Such services may not qualify as "incidental" to banking, or even as "closely related" to banking, at least in any traditional sense. They are at best "functionally related," to borrow a term once suggested by the Federal Reserve; that is, they complement traditional banking services and make use of many data in common with them. Banks may be able to overcome this kind of problem by forming very close working relationships with nonfinancial companies. In that event, however, the banks run the risk of being reduced to mere passive providers of financial information to the nonbanking entities; furthermore, some services that have traditionally been regarded as part of the business of banking (such as correspondent services) may migrate to the nonfinancial sector.

Some might suggest that this trend would be in the public interest. After all, Congress has long asserted the value of keeping the overall economic power of banks within bounds, and to that end has restricted the list of services that banks are eligible to perform. Furthermore, if banks are allowed to offer new kinds of service, banking supervisors would have to assume new responsibilities and exercise more control over activities that would otherwise be safe from regulation. In short, other things being equal, an argument might be made that it is better to keep banks out of any new fields, so long as nonbanking companies stand ready to provide equivalent services on a competitive basis — so goes the line of argument.

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But other things are not equal. It may be true that in many ways the new electronic services go beyond the traditional scope of banking activities. Nevertheless, the new services may be intimately involved with the depository and payment functions. These functions lie at the heart of banking and provide the basic reason for exercising oversight of the banking industry. Furthermore, unless banks are able to participate fully in producing the new services, some kinds of services might never come into existence, while others might have to absorb extra costs in order to accommodate themselves to outdated regulatory requirements. Some broadening of bank powers — and some broadening of bank supervisors' powers — may therefore be appropriate. In particular, banks would need wider data communications and data processing authority.

One of the consequences of giving banks wider powers, however, is that a new contingent of companies would become eligible to enter the business of banking. Their entry could present new questions about the proper degree of economic power that the financial industry ought to be able to exercise. In addition, banks themselves might have their own reasons to be worried. Some data processing and telecommunications companies might want to acquire banks in order to supplement their existing line of services. Banking/telecommunications conglomerates would represent a marked change in the character of the banking industry and could present a strong competitive challenge to banks without that dimension.

Another possibility is that the character of bank supervision could change. One of the most intractable problems may be judging the safety-and-soundness of bank services that by their very nature depend on coordinated activity by many parties, some of whom are not subject to federal supervision. Perhaps bank regulators will have to put more emphasis on safeguards that come into play after damage has been inflicted, rather than on procedures aimed at preventing the damage from occurring. This kind of approach might preserve the flexibility of banking services. But, at the same time, it could entail a higher degree of risk for the consumer and for the banking system as a whole.

It may also become more difficult to judge what kinds of data processing and telecommunications services are permitted for banks. Bank supervisors may have to move away from a "laundry-list" approach, in which certain services are generally approved for all banks, and adopt a more particularized approach that pays special attention to the circumstances of the applicant. Put another way, bank supervisors may have to move away from across-the-board rulemaking, and lean more toward adjudicatory procedures, or procedures that have more of the flavor of the Department
of Justice’s Business Review Letter mechanism. This kind of shift could be costly for the agencies and could lead to greater controversy over particular decisions. But it may be the only way to deal with the extremely complicated questions that are likely to arise as the banking and telecommunications industries begin to intersect.

A third consequence is that standard-setting is likely to become more significant as a competitive factor than it has been in the past. So long as standards (such as MICR encoding for checks) have only applied to exchanges among banks, it has been comparatively easy to keep them from favoring one group of competitors over another. Today, however, standards affect many parties besides banks and can intrude into the relationship between banks and their customers. If standards have the effect of choking off alternative bankcard technologies, of shutting out competitors, or of artificially raising the prices for bankcard services, the standards might be vulnerable to attack as being a misuse of the banks’ pooled power.

Standard-setting also raises consumer protection issues. Banks have tried to protect their cardholders by issuing personal identification numbers to them, and by using the numbers to verify the identities of people seeking to use their cards. As electronic consumer services grow more complex, there may soon be a need for new kinds of protective mechanisms. Banks will want to make sure that these mechanisms can be adapted to the operational requirements of multibank networks. Consumer advocates may recognize the banks’ needs, but they will want to make sure that the mechanisms are easy for people to understand, and that the standards do not jeopardize the cardholders’ privacy. The debate on this issue has hardly begun.

VIII. Conclusion

For several years, antitrust concerns in the bankcard industry have focused on two main points: defeating rules that limit the scope and variety of bankcard systems, and preventing monopolistic bankcard systems (whether government-operated or privately-owned) from coming into being. The bankcard industry has changed so much, however, that these matters may no longer deserve a very high priority. Instead, the telecommunications and data processing aspects of bankcard services — and of banking in general — may form the center of the next round of debate.

It is still too early to tell what sort of competitive problems are likely to present the most trouble once banking emerges from this period of transition. Moreover, it is too early to judge what sort of constraints may be
needed to deal with these problems. The only thing that seems clear is that the issues that once dominated the debate have lost their focus: changing technology has made them obsolete.