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November 11, 1974

Donald I. Baker, Esq.
Deputy Assistant Attorney General
Justice Department, Antitrust Division
Washington, D. C. 20530

Dear Mr. Baker:

In accordance with the business review procedure of the Department of Justice we request a favorable review letter concerning a proposed amendment to section 2.16 of the by-laws of National BankAmericard Incorporated (NBI). Amended section 2.16 would read as follows:

"Section 2.16. Requirements with Respect to other Credit Cards.

"(a) No member shall directly or indirectly (i) own, (ii) issue, (iii) assist in the issuance of, (iv) service, (v) honor, or (vi) solicit or 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 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.

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"(c) 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, processing, marketing, authorization, credit, collection and solicitation -- of such programs are separate. 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.

"(d) 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 twenty-four months from (1) _____, 1974, (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 circumstance which necessitates an adjustment hereunder, as the case may be.

"(e) '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.

"(f) '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."

A copy of the present by-laws of NBI is enclosed.

On November 6, 1974, the Board of Directors of NBI adopted the following resolution:

> "After an extensive review of the issue of duality, including alternative courses of action, and upon motion duly made, seconded and unanimously carried, it was
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> RESOLVED, that Section 2.16 of the corporation's By-Laws be amended in accordance with Proposal B* and the Secretary is directed to attach a copy of said Proposal to the minutes of this meeting;
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> and be it further
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> RESOLVED, that these amendments become effective after (i) the corporation has submitted this matter to the United States Department of Justice for a business review, (ii) counsel has had an opportunity to review the Department of Justice's written response, and (iii) the Board adopts a resolution setting forth the effective date after having had an opportunity to review the Department of Justice's written response and the opinion of counsel."

The amended by-law is designed to carry out more effectively the purpose of the original by-law 2.16, adopted October, 1970, to maintain and enhance competition between competing national bank card systems and between their respective members.

NBI was formed in June, 1970, as a joint venture of banks succeeding to the national bank card system which had originally developed through licenses between Bank of America N.T.&S.A. and its licensee banks. Interbank was formed as a joint venture of banks in 1967 to compete with the national bank card system then being organized by BankAmericard. While national bank cards face real competition from many other services, including so-called Travel and Entertainment cards (e.g., American Express), special purpose cards such as an air travel card, and to an extent cards of nationwide vendors such as oil companies, there are only two presently existing national bank cards, NBI's BankAmericard, and the Interbank/Master Charge card. At all times Interbank has been larger than NBI in number of banks, transactions and the like.

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* Proposal B is quoted on pages 1 and 2 of this letter.

From its inception in 1970, NBI was faced with the problem of permitting or prohibiting banks from participating in both the NBI and the Interbank systems. It was and is NBI's opinion that such joint membership was inconsistent with competitive systems and could result in a de facto or de jure merger of all or part of the systems. Accordingly, in October of 1971, NBI, being still unaware of the exact nature and full scope of the competition that existed and would develop between the two systems, but being convinced that it should continue and be enhanced, passed its original by-law section 2.16, effective December 1, 1971. A copy of that by-law is enclosed. It prohibited a bank from issuing cards in both systems, and prohibited a card-issuing bank from participating as an agent of a bank in a competing system. It did not, however, prohibit an agent bank of a bank in one system from simultaneously being an agent of a bank in the other system.

Under section 2.16, member banks had one year within which to bring themselves into compliance. Well prior to that time, the by-law was challenged in an action under the anti-trust laws filed on November 26, 1971, by Worthen Bank and Trust Company, a bank in Little Rock, Arkansas, an NBI member, which sought to be a card-issuing bank in the Interbank system. In April, 1972, Worthen obtained a summary judgment holding the by-law invalid. On appeal, however, the judgment was reversed in Worthen Bank & Trust Co. v. National BankAmericard, Inc. (8 Cir. 1973) 485 F.2d 119, certiorari denied (Feb. 1974) 415 U.S. 918.

Following the remand in the Worthen case, NBI commenced discovery from its competitor Interbank, two of Interbank's regional members, Western Bank Card Association (WSBA) and Credit Systems, Incorporated (CSI), and of Worthen.

We have submitted to the Department a memorandum and appendices of 966 pages* setting forth the facts discovered to date. The Department also has NBI's briefs on appeal in the Worthen case, and the Appendix to the briefs which set out the structure and the background facts of the national bank card industry.

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* The memorandum and the appendices were filed under seal in the United States District Court for the Eastern District of Arkansas, Western Division, pursuant to protective orders of the court. The court has granted permission for the documents to be shown to the Department of Justice. While NBI has no objection to the release of any of the information contained in the memorandum and appendices, the other parties to those protective orders have objections to the release of certain of the information contained therein.

In NBI's opinion, the evidence developed in the Worthen case and reflected in the memorandum submitted to the Department, and in the affidavits filed in the Worthen case shows beyond any reasonable doubt that:

A. Neither of the two national bank credit card (NBI and Interbank/Master Charge) systems could have been produced by individual banks.

B. The systems have been, from their inceptions, competitors in the bank card industry, and the spur of competition is real and compelling in that:

1. The two systems compete for cardholder usage, merchant acceptance and bank membership.

2. The two systems compete to achieve technological innovation in:

(a) National authorization systems;

(b) Interchange and electronic data transfer systems;

(c) Point of sale and remote bank terminal installations;

(d) Development of processing and other software; and

(e) Other areas of technological development.

3. The two systems compete in planning, organizing and striving to develop and implement new services for cardholders and mercnants.

C. Dual membership in the existing bank card industry systems is in violation of the antitrust laws because:

1. Dual membership causes misuse of confidential and proprietary information;

2. Dual membership erodes and eventually eliminates competition;

3. Dual membership lessens the incentive to promote each system competitively; and

4. Dual membership will result in the eventual merger of the two bank card systems.

In connection with NBI's increasing competitive activities, the Worthen litigation and a potential settlement of that litigation, NBI has not only considered facts developed by discovery, but has conducted a series of meetings with representatives from its card-issuing members to determine the potential impact of duality upon the various banking conditions that obtain throughout the country and upon the accelerating competitive thrust of the two systems.

The evidence obtained in discovery and the results of NBI's study convinced NBI that section 2.16 by failing to prohibit dual agent banks in the two competing systems created some local mergers of both systems in agent banks to the detriment of competition; put pressures upon present card-issuing banks to follow suit and become members of the two competing systems; has discouraged dual agent banks from becoming card-issuing banks. The agent banks are fulfilling the functions of member banks sometimes as principals upon specific matters and sometimes as agents. In addition, in NBI's opinion participation in competing systems diminishes the incentive of agent banks to promote and develop one system over the other.

The pendency of the Worthen suit, and NBI's repeated statements that it would defend and win that suit and enforce by-law 2.16 has acted as a strong deterrent to other card-issuing banks from becoming members of the competing system. Notwithstanding that threat, pressure from dual agent banks has caused at least 3 banks to become card-issuing banks in both systems, 11 banks which are issuers of BankAmericards to become agents of Master Charge banks as well, and 75 Master Charge card-issuing banks to become Class B members of NBI, i.e., agents of NBI card-issuing banks.* Such banks in turn put even greater pressure upon non-dual banks. The threat of litigation has held back the flood, based upon the assumption that NBI would be able to meet the dual agent bank problem.

NBI believes that the maintenance and furtherance of competition in the national bank card industry is a matter of national importance which warrants the Department of Justice issuing a business review letter with respect to the proposed by-law for the guidance of NBI and its members and for the industry in general. While limited links between the two competing systems at some future date (e.g., data capture at point of sale) may be desirable, it is by no means clear when, how or even if such matters are necessary, practical or to what degree they may affect competition. The clear and present

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* Because of the summary judgment in the District Court, NBI could not enforce by-law 2.16.

danger of competition being displaced by monopoly requires that every tendency toward merger, de facto or de jure, be prevented. NBI submits that competition between the two competing bank card systems must not be lessened and that it is the duty of each system to resist any action which will lessen that competition which has proved so productive of innovation in the past and which should continue to benefit the public. NBI submits that its by-law is a reasonable method of preserving that competition against the anti-competitive effects of dual membership.

Because dual membership has increased steadily for several years causing increased pressure from non-dual banks to become dual with effects which NBI believes are seriously anitcompetitive; and because we believe that a final resolution of the matter is in the best interest of the public as well as all banks, we request that the Department expedite its consideration of this matter.

We shall be pleased to furnish, so far as possible, any further information the Department may desire.

Very truly yours,

Francis R. Kirkham

Allan N. Littman

Attorneys for National
BankAmericard Incorporated