

Appendix 1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, et al.,
Plaintiffs

v.

AMERICAN EXPRESS CO., et al.,
Defendants

**[PROPOSED] REMEDIAL
ORDER AND
FINAL JUDGMENT AS TO
THE AMERICAN EXPRESS
DEFENDANTS**

No. 10-CV-04496 (NGG)

NICHOLAS G. GARAUFIS, United States District Judge.

I. INTRODUCTION

Following a bench trial, the Court issued a decision on February 19, 2015, determining that American Express's "Non-Discrimination Provisions" (NDPs) violate Section One of the Sherman Act, 15 U.S.C. §1. Pursuant to a Scheduling Order also issued on February 19, 2015, the parties made submissions concerning appropriate remedy. Having given these submissions due consideration, and on the basis of the trial record, the Court issues this Remedial Order and Final Judgment as to Defendants American Express Company and American Express Travel Related Services Company, Inc.

II. DEFINITIONS

As used in this Final Judgment:

A. "Acquiring Bank" means a Person authorized by a General Purpose Card Network to enter into agreements with Merchants to accept that Network's General Purpose Cards as payment for goods or services.

B. "American Express" means American Express Company, a New York corporation with its principal place of business in New York, New York, and American Express

Travel Related Services Company, Inc., a Delaware corporation with its principal place of business in New York, New York, their successors and assigns, and their subsidiaries (whether partially or wholly owned), divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

C. “Brand” means the brand or mark of a General Purpose Card Network.

D. “Customer” means a Person that pays for goods or services.

E. “Department of Justice” means the United States Department of Justice, Antitrust Division.

F. “Discover” means Discover Financial Services, a Delaware corporation with its principal place of business in Riverwoods, Illinois, its successors and assigns, and its subsidiaries (whether partially or wholly owned), divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

G. “Effective Date” means the date, under Section VII.A of this Final Judgment, on which this Final Judgment takes effect.

H. “Final Judgment” means this document: the Remedial Order and Final Judgment as to the American Express Defendants.

I. “Form of Payment” means cash, a check, a debit card, a prepaid card, or any other means by which Customers pay for goods or services, and includes particular brands (*e.g.*, Star, NYCE) or types (*e.g.*, PIN debit) of debit cards or other means of payment.

J. “General Purpose Card” means a credit or charge card issued pursuant to Rules of a General Purpose Card Network that enables consumers to make purchases from unrelated Merchants without accessing or reserving funds, regardless of any other functions the card may have.

K. “General Purpose Card Network” means any Person that directly or indirectly assembles a group of unrelated Merchants to accept and a group of unrelated consumers to make purchases with General Purpose Cards bearing the Person’s Brand, and includes General Purpose Card Networks such as Visa, MasterCard, American Express, and Discover.

L. “Including” means including but not limited to.

M. “Issuing Bank” means a Person authorized by American Express to enter into agreements with cardholders for the use of American Express’s General Purpose Cards for payment at a Merchant.

N. “MasterCard” means MasterCard International Incorporated, a Delaware corporation with its principal place of business in Purchase, New York, its successors and assigns, and its subsidiaries (whether partially or wholly owned), divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

O. “Merchant” means a Person that accepts American Express’s General Purpose Cards as payment for goods or services. For the avoidance of doubt, “Merchant” includes Merchants that offer the service of facilitating General Purpose Card payments for other Persons (such as governmental entities and universities) and Merchants that offer mobile wallet services.

P. “Person” means any natural person, corporation, company, partnership, joint venture, firm, association, proprietorship, agency, board, authority, commission, office, or other business or legal entity, whether private or governmental.

Q. “Plaintiff States” means the States of Arizona, Connecticut, Idaho, Illinois, Iowa, Maryland, Michigan, Missouri, Montana, Nebraska, New Hampshire, Ohio, Rhode Island, Tennessee, Texas, Utah, and Vermont.

R. “Representative Plaintiff States” means, as of the Effective Date of this Final Judgment, the States of Missouri, Ohio, and Texas. The Plaintiff States may designate a different Plaintiff State as a substitute Representative Plaintiff State at any time by communicating the change in writing to American Express and the Department of Justice.

S. “Rule” means any rule, bylaw, policy, standard, guideline, or practice applicable to Merchants in the United States.

T. “Type” means a category of General Purpose Cards, including traditional cards, rewards cards, or premium cards (*e.g.*, a “Visa Signature Card” or a “World MasterCard”).

U. “Visa” means Visa Inc., a Delaware corporation with its principal place of business in San Francisco, California, its successors and assigns, and its subsidiaries (whether partially or wholly owned), divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees, but shall not include Visa Europe Limited and its wholly owned affiliates.

V. The terms “and” and “or” have both conjunctive and disjunctive meanings.

III. APPLICABILITY

This Final Judgment applies to American Express and to all other Persons in active concert or participation with it who receive actual notice of this Final Judgment by personal service or otherwise.

IV. PROHIBITED CONDUCT

A. The purpose of this Section IV is to allow Merchants to attempt to influence the General Purpose Card or Form of Payment Customers select by providing choices and information in a competitive market. This Final Judgment should be interpreted to promote such efforts and not limit them. Accordingly, American Express shall not adopt, maintain, or enforce

any Rule, or enter into or enforce any agreement that directly or indirectly prohibits, prevents, or restrains any Merchant in the United States from

1. offering the Customer a discount or rebate, including an immediate discount or rebate at the point of sale, if the Customer uses a particular Brand or Type of General Purpose Card, a particular Form of Payment, or a Brand or Type of General Purpose Card or a Form of Payment other than the General Purpose Card the Customer initially presents;

2. offering a free or discounted product if the Customer uses a particular Brand or Type of General Purpose Card, a particular Form of Payment, or a Brand or Type of General Purpose Card or a Form of Payment other than the General Purpose Card the Customer initially presents;

3. offering a free or discounted or enhanced service if the Customer uses a particular Brand or Type of General Purpose Card, a particular Form of Payment, or a Brand or Type of General Purpose Card or a Form of Payment other than the General Purpose Card the Customer initially presents;

4. offering the Customer an incentive, encouragement, or benefit for using a particular Brand or Type of General Purpose Card, a particular Form of Payment, or a Brand or Type of General Purpose Card or a Form of Payment other than the General Purpose Card the Customer initially presents;

5. expressing a preference for the use of a particular Brand or Type of General Purpose Card or a particular Form of Payment;

6. promoting a particular Brand or Type of General Purpose Card or a particular Form or Forms of Payment through posted information, through the size, prominence, or sequencing of payment choices, or through other communications to a Customer;

7. communicating to a Customer the reasonably estimated (including, *e.g.*, average) or actual costs incurred by the Merchant when a Customer uses a particular Brand or Type of General Purpose Card or a particular Form of Payment or the relative costs of using different Brands or Types of General Purpose Cards or different Forms of Payment; or

8. engaging in any other practices substantially equivalent to the practices described in Sections IV.A.1 through IV.A.7 of this Final Judgment.

B. Subject to compliance with the antitrust laws, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, and any other applicable state or federal law, nothing in this Final Judgment shall prohibit American Express from

1. enforcing existing agreements or entering into agreements pursuant to which a Merchant selects General Purpose Cards bearing the American Express Brand as the only General Purpose Cards the Merchant will accept as payment for goods or services;

2. enforcing existing agreements or entering into agreements pursuant to which a Merchant agrees that it will encourage Customers to use co-branded or affinity General Purpose Cards bearing both American Express's Brand and the co-brand or affinity partner's name, logo, or brand as payment for goods and services and will not encourage Customers to use General Purpose Cards bearing the Brand of any other General Purpose Card Network;

3. entering into agreements pursuant to which a Merchant agrees (i) that it will encourage Customers, through specific, listed practices falling under the protections enumerated in Sections IV.A.1 through IV.A.8 of this Final Judgment, to use General Purpose Cards bearing American Express's Brand as payment for goods and services, and (ii) that it will not use the same specific, listed practices to encourage Customers to use General Purpose Cards bearing any other Person's Brand as payment for goods and services; *provided that* (a) any such

agreement is not part of the Merchant's card acceptance agreement, is individually negotiated with the Merchant, and is not a standard agreement or part of a standard agreement generally offered by American Express to multiple Merchants (for the purpose of this Section IV.B.3, an agreement is not made "non-standard" by inclusion of minor variations in wording; only a significant and substantive difference makes an agreement "non-standard"), and (b) the Merchant's acceptance of American Express's General Purpose Cards as payment for goods and services is unrelated to and not conditioned upon the Merchant's entry into any such agreement; or

4. adopting, maintaining, and enforcing Rules that prohibit Merchants from encouraging Customers to pay for goods or services using one of its General Purpose Cards issued by one particular Issuing Bank rather than another of its General Purpose Cards issued by any other Issuing Bank.

C. Subject to Section IV.A of this Final Judgment, nothing in this Final Judgment shall prohibit American Express from adopting, maintaining, and enforcing Rules (including the Rules identified in Section V.B of this Final Judgment, if modified in accordance with that Section V.B) or entering into or enforcing agreements that prohibit Merchants from disparaging its Brand, including (1) mischaracterizing American Express General Purpose Cards, or (2) engaging in activities that harm American Express's business or its Brand. For the avoidance of doubt, American Express shall not prohibit, prevent, or restrain a Merchant from engaging in any of the practices enumerated in Section IV.A of this Final Judgment on the grounds that American Express believes or asserts that one or more of such practices disparage its Brand, including by mischaracterizing its General Purpose Cards or harming its business or Brand.

D. American Express shall not adopt, maintain, or enforce any Rule, or enter into or enforce any agreement, that prohibits, prevents, restrains, deters, or inhibits an Acquiring Bank from supplying a Merchant, on a transaction-by-transaction or other basis, information regarding the costs or fees the Merchant would incur in accepting a General Purpose Card, including a particular Type of General Purpose Card, presented by the Customer as payment for that Customer's transaction.

V. REQUIRED CONDUCT

A. On or before the Effective Date of this Final Judgment, American Express shall delete, discontinue, and cease to enforce in the United States any Rule that it would be prohibited from adopting, maintaining, or enforcing pursuant to Section IV of this Final Judgment.

B. American Express shall make the following specific changes to its Rules:

1. American Express shall modify Section 3.2 of the "American Express Merchant Reference Guide – U.S." (PX-0001) by adding the underscored language and by deleting at least the double-bracketed and italicized language, as indicated below:

3.2 treatment of the American Express brand

American Express has built a brand that is synonymous with trust, integrity, security, quality, and customer service. We work diligently to uphold our reputation and restrict Merchants from engaging in activities that would harm our business or brand.

Except as expressly permitted by Applicable Law, Merchants must not:

- *[[indicate or imply that they prefer, directly or indirectly, any Other Payment Products over our Card,]]*
- *[[try to dissuade Cardmembers from using the Card,]]*
- *[[criticize or]]* mischaracterize the Card or any of our services or programs,

- *[[try to persuade or prompt Cardmembers to use any Other Payment Products or any other method of payment (e.g., payment by check),]]*
- impose any *[[restrictions, conditions, disadvantages or]]* fees when the Card is accepted that are not imposed equally on all Other Payment Products, except for electronic funds transfer, cash, and checks, or
- engage in activities that harm our business or the American Express Brand (or both)*[[, or*
- *promote any Other Payment Products (except the Merchant's own private label card that they issue for use solely at their Establishments) more actively than the Merchant promotes our Card]].*

Merchants are allowed to attempt to influence the General Purpose Card or Form of Payment that cardmembers select by providing choices and information in a competitive market. A Merchant may request or encourage a cardmember to use a means of payment other than the Card. Except where prohibited by law, the Merchant may do so by methods that include, but are not limited to:

- Offering the cardmember an immediate discount from the Merchant's list, stated, or standard price, a rebate, a free or discounted product or service, or any other incentive or benefit if the cardmember uses any Other Payment Product or other method of payment,
- Offering the cardmember an immediate discount from the Merchant's list, stated, or standard price, a rebate, a free or discounted product or service, or any other incentive or benefit if the cardmember, who initially presents the Card, uses instead any Other Payment Product or other method of payment,
- Expressing a preference for the use of the Card, any Other Payment Product, or other method of payment,
- Promoting the use of any Other Payment Product or other method of payment through posted information, through the size, prominence, or sequencing of payment choices, or through other communications to consumers, or
- Communicating to consumers, including cardmembers, the reasonably estimated (including, e.g., average) or actual costs

incurred by the Merchant when a consumer uses the Card, any Other Payment Product, or other method of payment or the relative costs of using different general purpose payment cards or other methods of payment.

[[Merchants may offer discounts or in-kind incentives from their regular prices for payments in cash, ACH funds transfer, check, debit card or credit/charge card, provided that (to the extent required by Applicable Law): (i) they clearly and conspicuously disclose the terms of the discount or in-kind incentive to their customers, (ii) the discount or in-kind incentive is offered to all of their prospective customers, and (iii) the discount or in-kind incentive does not differentiate on the basis of the issuer or, except as expressly permitted by applicable state statute, payment card network (e.g., Visa, MasterCard, Discover, JCB, American Express). The offering of discounts or in-kind incentives in compliance with the terms of this paragraph will not constitute a violation of the provisions set forth above in this section 3.2.]]

Subject to preserving a Merchant's ability to attempt to influence payment choice as set forth above in this Section 3.2, whenever you communicate the payment methods that you accept *[[are communicated]]* to customers, or when customers ask what payments are accepted, Merchants must indicate their acceptance of the Card *[[and display our Marks according to our guidelines and as prominently and in the same manner as any Other Payment Products]]*.

The Merchant must not use our Marks in any way that injures or diminishes the goodwill associated with the Mark, nor (without our prior written consent) indicate that we endorse the Merchant's goods or services. The Merchant shall only use our Marks as permitted by the Agreement and shall cease using our Marks upon termination of the Agreement.

2. American Express shall modify Section 3.2 of the "American Express Merchant Regulations – U.S." (PX-0002) by adding the underscored language and by deleting at least the double-bracketed and italicized language, as indicated below:

3.2 treatment of the American Express Brand

For the past 150 years, American Express has built a brand that is synonymous with trust, integrity, security, quality, and customer service. We work diligently to uphold our reputation, and restrict Merchants from engaging in activities that would harm our business or brand.

Except as expressly permitted by Applicable Law, you must not:

- *[[indicate or imply that you prefer, directly or indirectly, any Other Payment Products over our Card,]]*
- *[[try to dissuade Cardmembers from using the Card,]]*
- *[[criticize or]]* mischaracterize the Card or any of our services or programs,
- *[[try to persuade or prompt Cardmembers to use any Other Payment Products or any other method of payment (e.g., payment by check),]]*
- impose any *[[restrictions, conditions, disadvantages or]]* fees when the Card is accepted that are not imposed equally on all Other Payment Products, except for electronic funds transfer, or cash and check, or
- engage in activities that harm our business or the American Express Brand (or both)*[[, or*
- *promote any Other Payment Products (except your own private label card that you issue for use solely at your Establishments) more actively than you promote our Card]].*

[[You may offer discounts or in-kind incentives from your regular prices for payments in cash, ACH funds transfer, check, debit card or credit/charge card, provided that (to the extent required by Applicable Law): (i) you clearly and conspicuously disclose the terms of the discount or in-kind incentive to your customers, (ii) the discount or in-kind incentive is offered to all of your prospective customers, and (iii) the discount or in-kind incentive does not differentiate on the basis of the issuer or, except as expressly permitted by applicable state statute, payment card network (e.g., Visa, MasterCard, Discover, JCB, American Express). The offering of discounts or in-kind incentives in compliance with the terms of this paragraph will not constitute a violation of the provisions set forth above in this section 3.2, “treatment of the American Express Brand.”]]

Merchants are allowed to attempt to influence the General Purpose Card or Form of Payment that cardmembers select by providing choices and information in a competitive market. A Merchant may request or encourage a cardmember to use a means of payment other than the Card. Except where prohibited by law, the Merchant may do so by methods that include, but are not limited to:

- Offering the cardmember an immediate discount from the Merchant's list, stated, or standard price, a rebate, a free or discounted product or service, or any other incentive or benefit if the cardmember uses any Other Payment Product or other method of payment,
- Offering the cardmember an immediate discount from the Merchant's list, stated, or standard price, a rebate, a free or discounted product or service, or any other incentive or benefit if the cardmember, who initially presents the Card, uses instead any Other Payment Product or other method of payment,
- Expressing a preference for the use of the Card, any Other Payment Product, or other method of payment,
- Promoting the use of any Other Payment Product or other method of payment through posted information, through the size, prominence, or sequencing of payment choices, or through other communications to consumers, or
- Communicating to consumers, including cardmembers, the reasonably estimated (including, e.g., average) or actual costs incurred by the Merchant when a consumer uses the Card, any Other Payment Product, or other method of payment or the relative costs of using different general purpose payment cards or other methods of payment.

3. American Express shall modify the first paragraph of Section 3.2.1 of the “American Express Merchant Regulations – U.S.” (PX-0002) by adding the underscored language and by deleting at least the double-bracketed and italicized language, as indicated below:

3.2.1 treatment of the American Express marks

Subject to preserving a Merchant's ability to attempt to influence payment choice as set forth in Section 3.2, whenever you communicate the payment methods that you accept *[[are communicated]]* to customers, or when customers ask what payments are accepted, you must indicate your acceptance of the Card *[[and display our Marks (including any Card application forms we may provide you)as prominently and in the same manner as any Other Payment Products]]*.

4. Nothing in this Section V.B shall be construed to express any view on the legality of any Rule that American Express is not required to delete; in particular, no view is expressed concerning the legality of any past, present, or future Rule concerning surcharges.

C. American Express shall take the following actions to ensure that Merchants that accept its General Purpose Cards as payment for goods or services (i) are notified of this Final Judgment and the Rules changes that American Express makes pursuant to this Final Judgment; and (ii) are not restricted, discouraged, or prevented from engaging in any of the practices enumerated in Sections IV.A.1 through IV.A.8 of this Final Judgment. Within ten business days after the Effective Date of this Final Judgment, American Express shall furnish to the Department of Justice and the Representative Plaintiff States, for the approval of the Department of Justice, in consultation with the Representative Plaintiff States, a proposed form of written notification to be provided to Merchants

1. describing the Rules changes each made pursuant to this Final Judgment;
2. informing Merchants that they are permitted to engage in any of the practices enumerated in Sections IV.A.1 through IV.A.8 of this Final Judgment; and
3. informing each such Merchant that American Express will no longer enforce any provision in any agreement between American Express and the Merchant that American Express would be prohibited from entering into or enforcing pursuant to Section IV.A of this Final Judgment.

American Express shall include the following statement in each such written notification:

A federal court has ruled that American Express violated the law by prohibiting merchants from influencing the payment form that their customers use. As a result of that ruling, you may now favor any credit card brand or form of payment that you wish, by, for example, communicating to customers which credit card brand you

would prefer that they use, telling customers which credit card brands are the most or least expensive for you, or offering discounts or incentives to customers to use the credit card brand you prefer.

Within five business days after receiving the approval of the Department of Justice, American Express shall furnish the approved notification described above, together with a paper or electronic copy of this Final Judgment (including by providing a hyperlink to the Final Judgment in an email communication) to each Merchant that is permitted to accept American Express General Purpose Cards as payment for goods or services. American Express shall give notice directly or cause notice in compliance with this Final Judgment to be given through non-party agents such as processors, External Sales Agents, OnePoint partners, or OptBlue partners.

D. Within five days of entering into any agreement permitted by Section IV.B.3 of this Final Judgment, American Express shall furnish electronically to the Department of Justice and the Representative Plaintiff States a complete copy of the agreement (including any attachments or appendices).

E. American Express shall furnish to the Department of Justice and the Representative Plaintiff States quarterly, beginning ninety days after the Effective Date of this Final Judgment, (1) a list of each Merchant whose right or ability to accept American Express General Purpose Cards as payment for goods or services was terminated or suspended by American Express for any reason during the preceding quarter, and (2) a statement of the basis or bases for American Express's decision to terminate or suspend each Merchant's acceptance of American Express General Purpose Cards.

F. American Express shall notify the Department of Justice and the Representative Plaintiff States in writing, delivered electronically, ten business days before communicating to any Merchant that American Express may terminate, or intends to terminate, the right or ability

of the Merchant to accept American Express General Purpose Cards as payment for goods or services (“Merchant Termination Communication”), if

1. a basis of such termination is that the Merchant has engaged in any of the activities enumerated in Sections IV.A.1 through IV.A.8 of this Final Judgment, that the Merchant has a plan or intention to engage in such activities, or that American Express suspects that the Merchant has engaged in such activities;

2. a basis of such termination is the Merchant’s disparaging of American Express’s Brand, including mischaracterization of American Express’s General Purpose Cards or harm to American Express’s business or Brand; or

3. American Express knows or has reason to believe that the Merchant is engaging in any of the activities enumerated in Sections IV.A.1 through IV.A.8 of this Final Judgment, even if the Merchant’s engagement in such activities is not an actual or asserted basis for American Express’s contemplated or intended termination of the Merchant.

As used in this Section V.F, “termination” includes allowing a merchant’s contract to expire on the basis of the dates therein. The written notification to the Department of Justice and the Representative Plaintiff States shall include the identity of the Merchant and full contact information for the employee of the Merchant to whom American Express directs any communications concerning the Merchant’s relationship with American Express or the Merchant’s acceptance of American Express General Purpose Cards. Such written notification shall also describe in detail the conduct of the Merchant giving rise to American Express’s threatened termination. If American Express proceeds to deliver a “Merchant Termination Communication” (written or oral) to any Merchant, American Express shall furnish the Merchant a paper or electronic copy of this Final Judgment and the following statement:

A federal court has ruled that American Express violated the law by prohibiting merchants from influencing the payment form that their customers use. As a result of that ruling, you may now favor any credit card brand or form of payment that you wish, by, for example, communicating to customers which credit card brand you would prefer that they use, telling customers which credit card brands are the most or least expensive for you, or offering discounts or incentives to customers to use the credit card brand you prefer.

If American Express terminates any Merchant under conditions (1), (2), or (3) of this Section V.F, it shall notify the Department of Justice and the Representative Plaintiff States in writing, delivered electronically, within five days of such termination.

G. Within ten business days after the Effective Date of this Final Judgment, American Express shall furnish to the Department of Justice and the Representative Plaintiff States an affidavit describing the actions it took to comply with Sections V.A, V.B, and V.C of this Final Judgment.

H. American Express shall notify the Department of Justice and the Representative Plaintiff States, 30 days in advance of such adoption of a Rule or entry into an agreement, if it adopts a new Rule or enters into a new agreement that restricts, limits, or restrains how any Merchant accepts, processes, promotes, or encourages use of (1) Forms of Payment other than General Purpose Cards or (2) General Purpose Cards bearing the Brand of another General Purpose Card Network.

VI. COMPLIANCE AND ENFORCEMENT PROCEDURES

A. For purposes of determining or securing compliance with this Final Judgment, or of determining whether the Final Judgment should be modified or vacated, and subject to any legally recognized privilege, from time to time duly authorized representatives of the Department of Justice or the Representative Plaintiff States, including consultants and other persons retained

by the United States or the Representative Plaintiff States, shall, upon written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division or a joint written request by authorized representatives of each Representative Plaintiff State, and on reasonable notice to American Express, be permitted

1. access during regular business hours to inspect and copy, or at the option of the Department of Justice or the Representative Plaintiff States, to require American Express to provide to the Department of Justice and the Representative Plaintiff States paper or electronic copies of all books, ledgers, accounts, records, data, and documents in the possession, custody, or control of American Express, relating to any matters contained in this Final Judgment; and

2. to interview, either informally or on the record, American Express's officers, employees, or agents, who may have their individual counsel present, regarding such matters. The interviews shall be subject to the reasonable convenience of the interviewee and without restraint or interference by American Express.

B. Upon the written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division or a joint written request by authorized representatives of each Representative Plaintiff State, American Express shall submit written reports or respond to written interrogatories, under oath, relating to any of the matters contained in this Final Judgment. Written reports authorized under this paragraph may require American Express to conduct, at its cost, an independent audit or analysis relating to any of the matters contained in this Final Judgment.

C. No information or documents obtained by the means provided in Section VI.A or VI.B of this Final Judgment shall be divulged by the Department of Justice or any Plaintiff State to any person other than an authorized representative of the executive branch of the United States

or the Attorney General's Office of any Plaintiff State, except in the course of legal proceedings to which the United States or the relevant Plaintiff State(s) is a party (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If at the time information or documents are furnished by American Express to the Department of Justice and the Representative Plaintiff States, American Express represents and identifies in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure, and American Express marks each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure," then the Department of Justice and the Representative Plaintiff States shall give American Express ten calendar days' notice prior to divulging such material in any civil or administrative proceeding.

E. To ensure its compliance with this Final Judgment and the antitrust laws, American Express shall perform the activities enumerated below in Sections VI.E.1 through VI.E.8 of this Final Judgment. The Chief Compliance Officer of American Express (or other officer designated by American Express to ensure compliance with this Final Judgment) shall be responsible for supervising American Express's efforts to comply with this Final Judgment and performance of the following:

1. furnishing a copy of this Final Judgment, within thirty days of its Effective Date, to each senior officer of American Express and to each American Express employee who has direct contact with Merchants or who supervises employees who have direct contact with Merchants;

2. furnishing a copy of this Final Judgment in a timely manner to each officer or employee who succeeds to any position identified in Section VI.E.1 of this Final Judgment;

3. ensuring that each person identified in Sections VI.E.1 and VI.E.2 of this Final Judgment receives training annually on the meaning and requirements of this Final Judgment;

4. obtaining, within sixty days after the Effective Date of this Final Judgment and on each anniversary of the Effective Date of this Final Judgment, from each person identified in Sections VI.E.1 and VI.E.2 of this Final Judgment, and thereafter maintaining, a certification that each such person (a) has read, understands, and agrees to abide by the terms of this Final Judgment; and (b) is not aware of any violation of this Final Judgment or the antitrust laws or has reported any potential violation to the Chief Compliance Officer of American Express;

5. communicating annually to American Express's employees that they may disclose to the Chief Compliance Officer of American Express, without reprisal, information concerning any potential violation of this Final Judgment or the antitrust laws;

6. taking appropriate action, within three business days of discovering or receiving credible information concerning an actual or potential violation of this Final Judgment, to terminate or modify American Express's conduct to assure compliance with this Final Judgment; and, within seven days of discovering or receiving such information, providing to the Department of Justice and the Representative Plaintiff States a description of the actual or potential violation of this Final Judgment and the corrective actions taken;

7. furnishing to the Department of Justice and the Representative Plaintiff States on a quarterly basis electronic copies of any non-privileged communications with any Person containing allegations of American Express's noncompliance with any provision of this Final Judgment; and

8. providing to the Department of Justice and the Representative Plaintiff States annually, on or before the anniversary of the Effective Date of this Final Judgment, a written statement as to the fact and manner of American Express's compliance with Sections IV and V of this Final Judgment, and including the training or instructional materials supplied by American Express, pursuant to Section VI.E.3 of this Final Judgment, to employees who have direct contact with Merchants.

F. Third parties may submit complaints concerning American Express's compliance with this Final Judgment to the Department of Justice, to the Representative Plaintiff States, or to the Chief Compliance Officer of American Express.

VII. ADDITIONAL PROVISIONS

A. This Final Judgment shall take effect 30 days after the date on which it is entered. If the Final Judgment is stayed, all time periods in the Final Judgment will be tolled during the stay.

B. This Court retains jurisdiction to enable the United States, the Representative Plaintiff States, any other Plaintiff State (after consultation with the United States and the Representative Plaintiff States), or American Express to apply to this Court at any time for, or to act *sua sponte* to issue, further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions.

C. Nothing in this Final Judgment is intended to make any ruling or express any view about any Rule involving surcharging. Nothing in this Final Judgment is intended to make any ruling or express any view about the terms of the pending settlement in MDL 2221. Nothing in this Final Judgment shall limit the right of the United States or of the Plaintiff States to investigate and bring actions to prevent or restrain violations of the antitrust laws concerning any Rule of American Express, including any current Rule and any Rule adopted in the future.

D. This Final Judgment shall expire by its own terms and without further action of this Court ten years after its Effective Date, provided that, at any time prior to its expiration, the Court may *sua sponte* or on the application of the United States or any Plaintiff State extend the Final Judgment by one or more one-year periods, if necessary to ensure effective relief.

SO ORDERED.

Dated: Brooklyn, New York
[Date]

NICHOLAS G. GARAUFGIS
United States District Judge