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MEMORANDUM

October 18, 2017

To Our Clients and Friends

Re: U.S. Supreme Court Grants Certiorari in AmEx Merchant Rules Case

The U.S. Supreme Court has agreed to hear an antitrust case concerning American Express's rule preventing merchants from steering customers to other credit cards. A group of states alleged that these rules were anti-competitive in violation of the Sherman Antitrust Act.

In 2010, the U.S. Department of Justice and 17 states sued AmEx, Visa and MasterCard over their merchant agreements, which prohibited merchants from steering customers to other credit cards. While Visa and MasterCard settled, AmEx proceeded to trial. Applying the "rule of reason," the U.S. district court in New York held that AmEx's anti-steering provisions were anti-competitive because they stifled competition among credit card companies for the prices charged to merchants, and AmEx failed to establish any procompetitive benefits. However, the U.S. Court of Appeals for the Second Circuit reversed, holding that to prove that the anti-steering provisions were anti-competitive, the government bore the burden of showing not just that the provisions had anti-competitive pricing effects on merchants, but also that those effects outweighed any benefits to cardholders.

Interestingly, despite its agreement with the states that the lower court's decision was incorrect, the Justice Department urged the Court to deny review because the case did not meet the Court's normal standards for granting review, particularly because no other courts had considered some of the legal issues in the case.

The case is *Ohio, et al. v. American Express Company, et al.* (No. 16-1454).

If you have any questions, please call Gilbert Schwartz, Robert Ballen, Tom Fox, Heidi Wicker or Magda Gathani at (202) 776-0700.