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FINANCIAL SERVICES LITIGATION
ALERT

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Previously Banned Fees Charged to Consumers Now Permissible for Visa and MasterCard Transactions

By Patrick M. Horan

In November 2012, the U.S. District Court for the Eastern District of New York preliminarily approved a settlement agreement in the *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*. As a result, merchants may now charge their Visa and MasterCard customers supplemental fees to recover the cost incurred when credit cards are used as the form of payment.

The $7.25 billion settlement, reached in July 2012 between credit card issuers and merchants, is the end result of a class action filed in 2005. The plaintiffs alleged that card companies conspired with major banks to fix fees at an artificially high level that are charged to merchants when customers pay with credit cards. Some defendant banks issued the Visa and MasterCard branded payment cards to customers while other defendant banks acted as intermediaries between the merchant and the issuing banks. The interchange fees at the center of the case were paid by merchants when customers used Visa or MasterCard credit cards in their stores. Surcharges to recover such costs have customarily been prohibited by Visa and MasterCard under their respective merchant agreements. As part of this settlement, Visa and MasterCard were required to implement specified rule changes, including the ability for merchants in the United States and U.S. territories to surcharge credit card transactions beginning January 27, 2013.

The settlement was preliminarily approved by a federal judge of the Eastern District of New York on November 9, 2012, despite objections from named plaintiffs. As part of the settlement, Visa and MasterCard agreed to reduce the interchange fees paid by merchants for an eight-month period following the effective date of the settlement. After the eight-month period, Visa and MasterCard will begin allowing merchants to recover the previously-banned surcharges at the point of sale.

Under the proposal, to charge the customer a fee, a merchant must comply with certain requirements. First, a surcharge payable by the customer is still not permitted in connection with debit or prepaid credit card transactions. Second, the merchant may only charge the customer for the actual cost of the transaction incurred by the merchant in connection with such transaction, but not to exceed 4 percent of the total amount of the charged amount. Third, the merchant must post notice both at the entrance of the merchant's store and at the point of purchase of the merchant's intent to charge its customers a fee. For online merchants, this notice must appear on the page where the availability of the use of credit cards is first mentioned. Finally, the merchant must show the amount of the surcharge on the receipt and disclose that the amount is equal to what the merchant pays to process such credit card transaction.

The terms of the settlement create multiple complications that a merchant must consider before imposing surcharges: the terms require merchants who charge fees on Visa or MasterCard transactions to charge the same fee on transactions where the credit card used carries an equal or greater interchange fee. Accordingly, under the terms of the settlement, a merchant must charge a surcharge on a transaction where the method of payment is some form other than the use of Visa or MasterCard, such as American Express. It is unclear whether American Express allows the imposition of a surcharge at this point. In the past, American Express has prohibited such a practice. Without clarity, it is uncertain if a merchant who accepts all three cards, *i.e.*, Visa, MasterCard and American Express, will be able to charge fees on any credit card transaction including Visa and MasterCard without violating American Express policy.

A second complication that merchants must consider is that there are 10 states which do not allow the imposition of surcharges payable by the customer. Those states are: California; Colorado; Connecticut; Florida; Kansas; Maine; Massachusetts; New York; Oklahoma and Texas. Not only does this effect merchants in those jurisdictions, but it also

(continued on page 2)

(continued from page 1)

is problematic for national chains, as existing Visa and MasterCard policies require merchants to handle credit card transactions in the same manner across all locations of that merchant. That is, for example, if a merchant operates in California, which prohibits charging a fee, that merchant cannot surcharge at any of its other locations, even where applicable state law would otherwise allow.

Named plaintiffs oppose the settlement arguing that a majority of the class will not be able to take advantage of the terms of the settlement because the laws of certain states prohibit the charging of surcharges, and because the settlement does little to inject competition into the market as was the intent of the claim. Several retail groups have opposed the settlement also arguing that it doesn't provide enough benefit for merchants and gives card companies too much leeway in the future to raise rates. Some large retailers, including Target Corp., Wal-Mart Stores Inc., and Home Depot Inc., have also spoken out against the accord. In early April 2013, the Retail Industry Leaders Association ("RILA") opted out of the settlement. RILA's action will likely lead a large number of its more than 200 members — which membership includes industry giants, Wal-Mart, Target Corp., and Best Buy Co. The accompanying message from RILA is that the settlement grants an overly broad release from liability and does little to stop growth in fees down the road.

On a related front, arguments were heard this month in federal court in Brooklyn, New York, over whether websites created by trade groups are misinforming retailers about the settlement. The sites encourage businesses to opt out and object to the settlement. After strong words condemning the actions of the anti-settlement retail groups, the judge gave the lawyers for both the pro- and anti-settlement retailers one week to submit proposals for suitable relief.

Merchants have until May 28 to object to or opt out of the settlement. A final approval hearing is now set for September 2013. ◆

For more information about Schnader's Financial Services Litigation Practice Group or to speak with a member of the Firm, please contact:

Christopher H. Hart, Co-Chair
415-364-6707
chart@schnader.com

Stephen J. Shapiro, Co-Chair
215-751-2259
sshapiro@schnader.com

Patrick M. Horan
215-751-2206
phoran@schnader.com

www.schnader.com