

To: Our Clients and Friends

February 20, 2013

Visa/MasterCard Interchange Settlement Permits Merchants to Impose Surcharges Under Certain Circumstances

Preliminary approval to the \$7.25 billion class action interchange was granted in November, 2012, providing for a \$6.05 billion fund, a temporary reduction in interchange fees worth \$1.2 billion, modifications to the Visa/MasterCard rules,¹ and the ability for merchants to impose a surcharge on credit card purchases under certain circumstances. *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*² applies to all persons, businesses, and other entities that have accepted Visa- and MasterCard-branded credit cards in the U.S. since January 1, 2004, as well as anyone who will accept such cards in the future. A class action lawsuit against American Express is still pending.

The settlement was preceded by seven years of contentious litigation, beginning in 2005 when the first of more than 40 class complaints was filed. The class plaintiffs allege that Visa and MasterCard conspired with its member banks to establish default interchange fees, and that the network rules insulated those interchange fees from competition by preventing merchants from steering customers to less expensive forms of payment (such as rules preventing surcharging and discounting).

With respect to the settlement's surcharge provision, the Class Settlement Agreement with Visa and MasterCard ("Agreement") provides that merchants are permitted to assess surcharges on Visa/MasterCard transactions either at the "Brand Level" (e.g., an assessment on all Visa-branded credit card transactions) or "Product Level" (e.g., an assessment on all Visa-branded "Reward Card" credit card transactions), provided that (i) the fees are not prohibited by state law, (ii) the fees do not exceed the costs that the merchant pays to accept cards and (iii) the merchant complies with the disclosure requirements at the point of entry, point of sale and on the receipt.³ A checkout fee at the issuer level (e.g., an assessment on Visa-branded credit cards issued by Citibank and Bank of America, but not on Visa-branded credit cards from Capital One or from local banks) is not permitted. The Agreement also requires a level playing field by permitting a

¹ See <http://usa.visa.com/download/merchants/operating-regulations-merchant-litigation-settlement.pdf> and <http://www.mastercard.us/merchants/assets/docs/MerchantSurchargeRules.pdf>.

² *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, 05-MD-01720 (E.D.N.Y.).

³ *Id.* at pp. 41-49 and 54-65.

surcharge if (i) the merchant is able to surcharge each other credit card it accepts or actually does so and (ii) the merchant also surcharges equal or higher cost cards on networks that maintain non-discrimination rules (e.g. American Express, Discover).

Permitted “Brand Level” and “Product Level” Surcharges

More specifically, a permitted “Brand Level” surcharge with respect to Visa/MasterCard credit card transactions is one in which:

- (i) A merchant adds the same surcharge to all Visa/MasterCard credit card transactions, regardless of the card’s issuer or product type, after accounting for any discounts or rebates offered by the merchant at the point of sale; and
- (ii) The surcharge on each Visa/MasterCard credit card transaction is no greater than the merchant’s Visa/MasterCard surcharge cap (which is the average Merchant Discount Rate⁴ applicable to transactions at the merchant for the preceding one or twelve months, at the merchant’s option).

A permitted “Product Level” surcharge with respect to Visa/MasterCard credit card transactions is one in which:

- (i) A merchant adds the same surcharge to all Visa/MasterCard credit card transactions of the same product type (e.g., Classic Card, Traditional Rewards Card, Signature Card), regardless of the card’s issuer, after accounting for any discounts or rebates offered by the merchant at the point of sale; and
- (ii) The surcharge on each Visa/MasterCard credit card transaction is no greater than the merchant’s Visa/MasterCard surcharge cap for that product type (which is the average effective Merchant Discount Rate applicable to Visa/MasterCard credit card transactions of that product type at the merchant for the preceding twelve months) MINUS the Debit Card Cost of Acceptance.⁵

The Agreement provides that the surcharge on each Visa/MasterCard credit card transaction does not exceed the Maximum Surcharge Cap⁶ if Visa/MasterCard elects to set a Maximum Surcharge Cap and post on the Visa/MasterCard website the information set forth below in the first sentence of the definition of Maximum Surcharge Cap.

If a merchant’s ability to surcharge any competitive credit card brand (e.g., Amex, Discover, etc.) is limited in any manner (other than by prohibiting a surcharge greater than the competitive credit card brand’s cost of acceptance), then the merchant may surcharge Visa/MasterCard transactions only on either the same conditions on which the merchant *would be* allowed to surcharge

⁴ “Merchant Discount Rate” is defined as the fee, expressed as a percentage of the total transaction amount, that a merchant pays to its acquirer or processor for transacting on a credit card brand.

⁵ “Debit Card Cost of Acceptance” is the amount of the cap for debit transactions established by the Board of Governors of the Federal Reserve System.

⁶ “Maximum Surcharge Cap” is defined as an amount no less than the product of 1.8 times the sum of the system-wide average effective U.S. domestic Visa/MasterCard credit card interchange rate plus average network fees (defined to include network set fees to acquirers or merchants associated with the processing of a transaction or with the acceptance of the network’s brand) as of the Agreement’s preliminary approval date or as subsequently adjusted (at least annually, but no more than 2 times per year) pursuant to the Agreement.

transactions of that competitive credit card brand in the same channel of commerce, or on the terms on which the merchant *actually does* surcharge transactions of that competitive credit card brand in the same channel of commerce, after accounting for any discounts or rebates offered at the point of sale.⁷

Registration and Disclosure Requirements

A merchant's ability to apply either a Brand Level or Product Level Surcharge is conditioned on the merchant's agreement to abide by the following disclosure requirements:

- (i) *Register.* A merchant must register with the network and their acquirer (via written notice) 30 days prior to surcharging. The notice must identify whether the merchant intends to impose surcharges at the brand level or the product level.
- (ii) *Disclosure @ Point of Entry.* A merchant must provide clear disclosure to the merchant's customers at the point of store entry, or in an online environment on the first page that references credit card brands, that the merchant imposes a surcharge that is not greater than the applicable cost of acceptance.
- (iii) *Disclosure @ POS.* A merchant must provide clear disclosure to the merchant's customers of the merchant's surcharging practices, at the point of interaction or sale with the customer, in a manner that does not disparage the brand, network, issuing bank, or the payment card product being used. The information on the merchant's surcharging practices at the point of interaction must include (A) the amount of any surcharge that the merchant imposes, (B) a statement that the surcharge is being imposed by the merchant, and (C) a statement that the surcharge that the merchant imposes is not greater than the applicable cost of acceptance.
- (iv) *Disclosure on Receipt.* A merchant must provide clear disclosure of the dollar amount of the surcharge on the transaction receipt provided by the merchant to the customers.

Note: Nothing in the Agreement prevents Visa/MasterCard from contracting with merchants not to surcharge Visa- or MasterCard- branded credit cards or any product type of Visa- or MasterCard-

⁷ However, this provision does not apply if (a) the competitive credit card cost of acceptance to the merchant is less than the Visa/MasterCard credit card cost of acceptance to that merchant and the competitive credit card brand does not prohibit or effectively prohibit surcharging credit cards; or (b) the competitive credit card brand prohibits or effectively prohibits surcharging credit cards and the merchant actually surcharges the competitive credit card brand in an amount at least equal to the lesser of (I) the competitive credit card brand cost of acceptance or (II) the amount of surcharge imposed on the Visa/MasterCard transaction to be surcharged; or (c) there is an agreement between the merchant and the competitive credit card brand in which the merchant waives or in any other way restrains or limits its ability to surcharge transactions on that competitive credit card brand, as long as: (I) the agreement is for a fixed duration, is not subject to an evergreen clause, and is individually negotiated with the merchant and is not a standard agreement or part of a standard agreement generally offered by the competitive credit card brand to multiple merchants, (II) the merchant's acceptance of the competitive credit card brand as payment for goods and services is unrelated to and not conditioned upon the merchant's entry into such an agreement, (III) any such agreement or waiver is supported by independent consideration, and (IV) the agreement expressly specifies a price under which the merchant may accept transactions on the competitive credit card brand and surcharge those transactions up to the merchant's Merchant Discount Rate for the competitive credit card brand after accounting for any discounts or rebates offered by the merchant at the point of sale.

branded credit card as long as (i) the agreement is for a fixed duration, (ii) is not subject to an evergreen clause, (iii) is individually negotiated with the merchant or merchants organized in accordance with the Agreement and is not a standard agreement, and (iv) any such agreement or waiver is supported by "independent consideration."

A copy of the Agreement may be found at

<http://www.sec.gov/Archives/edgar/data/1403161/000119312512302336/d378086dex101.htm>.

If you have any questions or would like more information about the interchange settlement, please contact Margo Strahlberg or Judie Rinearson.

Margo Hirsch Strahlberg
Bryan Cave LLP
161 North Clark Street, Ste 4300
Chicago, IL 60601
(312) 602-5094 phone
(312) 698-7494 fax
mhstrahlberg@bryancave.com

Judith Rinearson
Bryan Cave LLP
1290 Avenue of the Americas
New York, NY 10404
(212) 541-1135 phone
(212) 541-1385 fax
judith.rinearson@bryancave.com

This Alert is published for the clients and friends of Bryan Cave LLP. To stop this Alert, please reply to this email. To stop this Alert and all future commercial e-mail from Bryan Cave LLP, please reply to: opt-out@bryancave.com and leave the message blank. Information contained herein is not to be considered as legal advice. Under the ethics rules of certain bar associations, this bulletin may be construed as an advertisement or solicitation.