

Rolling Out a Credit Card Surcharge Program in Canada: It's on the Horizon

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Suppliers throughout the US continue to try to navigate the dramatic increase of customers in the B2B space using credit cards to pay suppliers. The reasons for this increase in credit card payments are many. High on the list is the rewards program that card-issuing banks bestow on personal and corporate cardholders for using cards to pay their suppliers.

But the dramatic increase in card use for B2B payments is not limited to domestic customers. Canada, for example, has seen a comparable jump in the number of customers using credit cards to pay their Canadian suppliers. Suppliers distributing their product or service through a subsidiary in Canada are evaluating ways to limit card acceptance costs. What are the opportunities and risks for US subsidiaries in Canada to reduce card costs such as surcharging?

This article addresses (1) the class action lawsuit undertaken by Canadian merchants against Visa and MasterCard's Canadian networks and the card issuing banks, (2) the Card Companies' settlement agreements and process for court approval, and (3) the revised surcharge rules the card networks have pledged to adopt in light of the class action settlement.

The Class Action Lawsuit: Allegations and Causes of Action

In 2011, a number of retailers filed suit against Visa and MasterCard, and card issuing banks in British Columbia, Alberta, Saskatchewan, Quebec, and Ontario alleging the card network rules forced merchants, including suppliers, to accept all Visa or MasterCard cards, even ones that charged higher fees. Further, the retailers allege that Visa and MasterCard did not allow suppliers to add a surcharge to offset card costs. The retailers sued the card networks alleging civil conspiracy, breach of the Canadian Competition Act, and unlawful interference with economic interests, alleging that they suffered damages by paying more for credit card network services than they would have in the absence of the illegal agreements, thereby harming their businesses.

The Visa and MasterCard Settlement Agreements: Process for Approval

In June 2017, the retailers and Visa and MasterCard agreed to a settlement under which the card networks allow merchants, including suppliers, to surcharge, in addition to a class settlement payment.

The settlement is subject to court approval in each of the five Canadian provinces in which the claims were brought. Hearings will be held in the provinces in June, July and August. Court approval is expected.

The Revised Surcharge Rules for Canadian Payments

Per the terms of their settlement agreements, the card networks have pledged to adopt identical surcharge rules in light of the settlement. According to the settlement agreements between the Plaintiffs and the Card Companies, the revised surcharge rules will come into effect *no later than 18 months* after final court approval of the settlement, although the rules could become effective sooner.

However, we anticipate that surcharging may be permitted in Canada shortly after the class action settlements, not 18 months after the class settlement approval. In the US, the card networks allowed surcharging after the class action settlements.

Pending court approval, the revised surcharge rules are comparable to the US network surcharge rules:

- Suppliers must elect to surcharge at the brand level or product level;
- Even playing field: the surcharge must be no greater than an American Express surcharge;
- Brand and product level surcharges shall not exceed the merchant's average effective merchant discount rate for that brand during the last 1 month or 12 months;

- A merchant cannot impose a surcharge that is greater than the “maximum surcharge cap.” The “maximum surcharge cap” is the lesser of (1) 2.5% or (2) 1% plus the Card Companies’ average annual effective rate of interchange for credit card transactions in Canada. Card networks shall publish the “maximum surcharge cap” on the portions of their websites and rules that set forth merchants’ surcharging rights and obligations;
- A supplier who elects to surcharge shall provide the following by way of notification:
 - At least 30 days advanced, written notice to the card networks and issuing banks;
 - For retail transactions, signage requirements on the merchant’s entrance door and at the checkout/ payment area;
 - Explicitly showing the surcharge amount on the merchant receipt;
 - A clear indication that the surcharge was imposed by the merchant and not by the card company;
 - Provide the cardholder with the opportunity to cancel or opt-out of the transaction; and
 - Such further and other disclosures as may be required.

Final Analysis: What does this Mean for US Canadian Affiliates’ Ability to Surcharge?

It is likely the Canadian courts will find suppliers have the right to surcharge their customers. Card companies require suppliers to abide by five rules for surcharging, comparable for suppliers surcharging in the US: (1) disclosure to networks and cardholder; (2) calculating the surcharge; (3) a level playing field; (4) stratification; and (5) no debit card surcharging.

The good news for US suppliers with Canadian affiliates: there is a pathway to reduce card costs through surcharging their Canadian customers.

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