

An Update on Credit Card Surcharging in Canada: The Provinces have Approved the Class Action Settlements

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Credit teams throughout the US continue to deal with the dramatic increase of customers in the B2B space using credit cards to pay invoices. But the dramatic increase in card use for B2B payments is not limited to domestic customers. Canada 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. All Canadian Provinces have just approved a class action settlement between retailers and Visa and MasterCard that allows for Canadian suppliers to surcharge their credit card paying customers. In light of the Provinces' approval, what does it mean to the credit team and their Canadian customers?

The Class Action Lawsuit and Settlement

In 2011, a number of retailers filed suit against Visa and MasterCard, and card issuing banks in British Columbia, Alberta, Saskatchewan, Quebec, and Ontario alleged 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 surcharge to offset card costs.

The retailers alleged civil conspiracy, breach of the Canadian Competition Act, and unlawful interference with economic interests, alleging 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.

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 was subject to court approval in each of the five Canadian provinces in which the claims were brought.

Canadian Province Approval

The courts in all five Canadian Provinces — British Columbia, Alberta, Saskatchewan, Ontario, and Quebec — have approved the class action settlement. Appeals by a few retailers have been filed in four of the five Provinces. Visa and MasterCard have agreed to modify their no-surcharge rules notwithstanding the appeals of the class action settlement.

The Revised Surcharge Rules for Canadian Payments

Under the terms of the settlement agreement, the card networks have agreed to adopt identical surcharge rules in each of the Canadian Provinces. In light of Provinces' approval, when can a supplier surcharge their Canadian customers? In the US class action settlement, the card networks allowed surcharging shortly after court approval. We expect the card networks in Canada will also allow surcharging shortly.

Surcharging in Canada

The revised surcharge rules in Canada are comparable to the US card 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 fees 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 supplier and not by the card company; and
 - Provide the cardholder with the opportunity to cancel or opt-out of the transaction.

The Right to Surcharge in Canada: Next Steps

The Canadian courts have approved a class action settlement with the card networks that allows Canadian companies to surcharge their Canadian customers. Visa and MasterCard have amended their network rules for suppliers to surcharge. The final piece is Visa and MasterCard announcing that the surcharge rules are in effect, which we expect no later than Q1 2019.

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