lavery
Lawyers

Interpretation of the Code of Conduct for the Credit and Debit Card Industry in Canada: The Financial Consumer Agency of Canada provides some clarification

February 1, 2013

This publication was authored by Luc Thibaudeau, former partner of Lavery and now judge in the Civil Division of the Court of Québec, District of Longueuil.

On February 13, 2013, the Financial Consumer Agency of Canada (the "**Agency**") issued a new guidance (the "**Guidance**") to clarify the interpretation that must be given to the Code of Conduct for the Credit and Debit Card Industry in Canada (the "**Code**") with regard to three issues within the Canadian payment card industry (credit or debit cards) that, according to the Agency, are not in line with some of the key principles set out in the Code. These clarifications to the Code, provided by the Agency, will enable small businesses and merchants to be more informed about the scope of the rights and obligations of the parties regarding the terms of the agreements concluded between payment card network operators and their respective participants.

The Agency's mandate is to supervise payment card network operators to determine whether they are in compliance with the provisions of the *Payment Card Networks Act*[1]. The Code was developed by the Government of Canada with the cooperation of the Canadian payment card industry and was introduced in April 2010 to promote greater transparency for merchants and consumers. The Code's main objective is to ensure full disclosure of all processing fees related to payment card transactions.

According to the Agency, certain practices of the Canadian payment card industry contravened the letter and spirit of the Code. The Guidance recommends increased disclosure of information by payment card networks to merchants and the elimination of certain sales and business practices deemed inappropriate by the Agency. In addition, the Agency has stated that certain practices fail to comply with the Code because they do not ensure the provision of information to merchants in a manner that is clear, simple and not misleading.

The issues identified by the Agency primarily deal with costs disclosure and the terms applicable to the business relationship between payment card network operators and merchants. Among other things, the Agency has observed that merchants could be misled regarding the terms of the merchant-acquirer agreement they were required to sign and that is was difficult for them to make informed decisions about the payment card network services they choose to receive. Furthermore, the Agency noted that merchants were not always aware they were signing agreements with multiple

Copyright (c) Lavery, de Billy, S.E.N.C.R.L. - L.L.P.

providers for certain services related to the processing of payment card transactions. Multiple service provider agreements would impose certain penalties to merchants when they decide to cancel these related service contracts. The Agency wants to abolish such practices.

Pursuant to the Guidance, if a merchant decides to opt out of a related service contract because of a processing fee increase or any fee increase, no penalty would be imposed. Likewise the Agency believes that a package of contracts signed by a merchant for the processing of payment card transactions must be given a value equal to the main agreement signed with the acquirer or his representative.

Payment card network operators will work directly with their participants to correct the deficiencies identified by the Agency and establish appropriate timeframes within which to address the concerns raised by merchants. The Agency also wants payment card network operators and their participants to work together to ensure that vital information is provided to merchants in a consolidated fashion, such as a cover page, before a multiple service provider agreement is entered into by the merchant. The Agency has provided an “information summary box” that it strongly encourages participants to adopt with respect to the contract signing procedure.

The Agency expects that payment card network operators will publicly commit to this Guidance and incorporate the required amendments into their operating rules within 90 days of the date of the Guidance, which was issued on February 13, 2013. The Agency further expects that all participants will comply with the Guidance before it comes into effect, i.e. on November 12, 2013. In addition to Agency requirements, the provisions of Bill S-215[2], which received first reading on December 11, 2012, are worth mentioning. One of the bill’s main objectives is to legislate on interchange rates with regard to credit card transactions. All these new measures and proposals will undoubtedly generate heated debate in the payment card industry.

---

[1] S.C. 2010, c. 12, s. 1834.

[2] *An Act to amend the Payment Card Networks Act (credit card acceptance fees)*, First session, Forty-first Parliament, 60-61 Elizabeth II, 2011-2012.

Copyright (c) Lavery, de Billy, S.E.N.C.R.L. - L.L.P.