



New Rules Loom in 2009

Some in Washington want to tighten interchange and disclosure rules

By Marc D'Annunzio

One of the trends most likely to affect the card industry in 2009 is the prospect of additional regulation. In fact, given the magnitude of the U.S. economic meltdown and credit crisis, many observers expect that a financial institutions regulatory reform bill—which will likely include reforms aimed squarely at the card industry—will be proposed this year.

In general, 2008 was a year to remember—or perhaps forget—for the U.S. economy and, specifically, the financial services industry. The failure of Lehman Brothers, the bailout of iconic financial institutions such as AIG, and the succeeding liquidity injections from the Treasury Department and Federal Reserve—events that would have been difficult to imagine just a few months before—all occurred in rapid succession, marking what is most likely the worst economic downturn since the Great Depression.

Of course, the \$700 billion allocated to rescue the financial system did not come without strings attached. As a result of the bailout, Congress will probably want to tighten the reins on the banking and financial industry to address perceived weaknesses in the system and avoid a similar disaster. Moreover, even before the crisis turned Washington's full attention toward the financial services industry, the payments space was already the subject of considerable legislative scrutiny.

Last year, numerous bills intended to address perceived unfair practices in the card industry were introduced in Congress, but none were enacted. We should expect to see the topics that these bills sought to address—interchange and so-called “card practices” (such as interest rate adjustments and late fees)—come under scrutiny again this year.



Interchange

Interchange will likely continue to be at the forefront of any discussion of the payments industry this year. These fees have long been viewed by merchant groups as arbitrary and anticompetitive. The interchange regulation debate has recently gained steam in the United States as other jurisdictions continue to scrutinize interchange closely (the European Union) or cap it entirely (Australia). It is no surprise then, given what appears to be renewed support for regulation, that those arguments have now found some traction in America.

The most widely publicized interchange bill is the Credit Card Fair Fee Act of 2008, introduced last March by Rep. John Conyers (D-MI). As originally drafted, this bill proposed to form a panel of “payments system judges” who, with the benefit of mandatory information disclosures by issuers, acquirers, merchants, and card associations, would have the power to revise interchange rates for “covered electronic payment networks” such as MasterCard and Visa. As an alternative, industry participants

could enter into direct negotiations with card brands to set their own interchange rates, in which instance they could avoid the prospect of having the rates set by judges.

The bill was subsequently amended to eliminate the concept of payments system judges, and, in its current form, mandates that issuers, acquirers, merchants, and card associations negotiate new, presumably lower, interchange rates under the supervision of the Department of Justice. Predictably, both iterations of the bill were roundly hailed by merchant groups and vociferously opposed by banks.

While the bill suffered from numerous defects (including the lack of a mechanism to break deadlocks in the negotiations), it passed by a slim margin in the House Judiciary Committee with bipartisan support. Thereafter, the bill was delayed by a request from the House Financial Services Committee to review it, and once Congress' attention was diverted to the overall financial crisis, neither further committee review nor full House consideration was scheduled in 2008.

However, this delay may end up being an advantage for the bill's proponents. They have additional time to consider and address the perceived shortcomings in the bill, possibly increasing the chances that interchange legislation—whether in this bill, a similar bill, or a larger omnibus package—will be seriously considered and passed in 2009.

Card Practices

In 2008, legislators also attempted to rein in what some saw as unfair and abusive card practices. In February, Rep. Carolyn Maloney (D-NY) introduced the Credit Cardholders' Bill of Rights Act of 2008, which seeks to address "major industry abuses that unfairly hurt consumers while fostering fair competition and free market values." This bill covers much of the same ground as proposed rules from the Federal Reserve, the Office of Thrift Supervision (OTS), and the National Credit Union Administration (NCUA) and attempts to regulate a number of card practices, including interest rate increases, late fees, and double-cycle billing.

After it was overwhelmingly passed by the House in September, the bill never made it to a Senate vote in 2008. Given the broad support it received, the bill is expected to resurface in 2009. The only question is whether enough members of Congress believe that similar rules promulgated in the interim by the Fed, the OTS, and the NCUA prevent the need for congressional action.

Once Congress refocuses its attention on the card industry, the Credit Card Fair Fee Act and the Credit Cardholders' Bill of Rights (or new versions of those bills) may not be the only fruits of its labor. Disclosure to consumers and/or merchants regarding interchange fees, card association rules, or policies and practices related to potential and existing cardholders will likely be debated. Further, industry professionals may also see closer scrutiny of card association rules applicable to merchants, such as the anti-steering and anti-surcharge rules.

Consumer and merchant groups have succeeded in getting Congress'

attention on these issues, and appear to have great momentum on their side. Given the results of the November election and the recent economic woes, Americans' attitudes toward government regulation seem to be changing. Consequently, industry professionals should expect 2009 to be a busy year, not just for banking regulation but also for attempts at card industry regulatory reform. **TT**

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