

• FINANCIAL SERVICES E-LERT: PAYMENT CARDS — RECENT DEVELOPMENTS •

Suhuyini Abudulai and Terry Hall, Cassels, Brock & Blackwell LLP

Recent federal legal developments concerning payment cards will interest financial institutions, payment card acquirers, merchants and consumers.

CODE OF CONDUCT FOR THE CREDIT AND DEBIT CARD INDUSTRY

On August 16, 2010, many of the key elements of the new *Code of Conduct for the Credit and Debit Card Industry in Canada* (“Code”) came into effect. By February 17, 2011, payment card networks and their acquirers must comply with the code provisions for increased transparency and disclosure to merchants. Payment card issuers with debit cards in circulation that access multiple networks have until May 17, 2011 to re-issue debit cards, if necessary, to comply with Code requirements that competing domestic applications from different networks are not offered on the same card and co-badged cards present each brand with equal prominence.

The federal government announced the “voluntary” Code on April 16, 2010, following consultation, and updated it with minor revisions on May 18. The Financial Consumer Agency of Canada (“FCAC”), which was established in 2001 to administer consumer provisions in federal financial institutions legislation, is mandated to administer voluntary codes.

The Code applies to credit and debit card networks (referred to as payment card networks) and their participants (which include card issuers and acquirers). Although the Code does not formally define “payment card networks,” the government’s proposed *Payment Card Networks Act* (Bill C-9 discussed below) defines a payment card network as an “an electronic payment system — other than a prescribed payment system — used to accept, transmit or process transactions made by payment cards for money, goods or services and to transfer information and funds among issuers, acquirers, merchants and payment card users”. For now, we expect this meaning should be used when interpreting the Code.

The purpose of the Code is to promote fair business practices and to help merchants and consumers understand the costs and benefits associated with credit and debit cards. The Minister of Finance announced on May 18 that all payment card networks,

major debit and credit card issuers and payment processors have adopted the Code. Payment card networks must provide to the FCAC any requested information regarding actions taken by themselves or issuers. The elements of the Code that will take effect August 16 include the elements that:

- Prohibit debit and credit card functions on the same payment card. A “debit” card is not defined in the Code (but is described as providing access to a deposit account), thus allowing some ambiguity as to the classification of certain prepaid cards. The proposed *Payment Card Networks Act* (Bill C-9) does not help to resolve the ambiguity when it proposes to define a “payment card” to include prescribed devices that are used to access a credit or debit account, without elaborating on the meaning of “account”. Also, it is uncertain how the Code will be interpreted with respect to overdraft protection offered on deposit accounts that are accessed by consumers using debit cards as forms of payment.
- Address the “honour all cards” rule by allowing merchants to choose to accept credit or debit payments from a network without having to accept both forms of payment from that payment card network.
- Require 90 days advance notice to merchants by payment card networks of any fee increase or the introduction of any new fee related to any credit or debit card transaction.
- Require that payment card network rules allow merchants to provide discounts for different methods of payment and differential discounts between different payment card networks.
- Permit issuers to give premium credit and debit cards only to consumers who apply for them. Additionally, certain thresholds must be met by the consumer prior to the issuance of a premium payment card.

Payment card networks, issuers and acquirers are given nine months to increase transparency and disclosure to merchants, including in merchant-acquirer agreements and in statements provided to merchants. For example, merchant statements will have to include certain prescribed information such as interchange rates and the total amount of fees applicable to each interchange rate. Another element being phased in will give issuers of payment cards one year to re-issue cards already in circulation that (i) carry two brands that are not given equal prominence, or (ii) offer on the same debit card competing domestic applications from different networks (such as competing point-of-sale payment applications).

PAYMENT CARD NETWORKS ACT

Bill C-9 proposed the *Payment Card Networks Act*, to give the Minister of Finance the authority to regulate national payment card networks and the commercial practices of payment card network operators. Further, the bill proposed to give the FCAC a mandate to supervise payment card network operators to determine their compliance with the *Payment Card Networks Act* and its regulations.

Bill C-9 received Royal Assent on July 12, 2010 and, with the exception of ss. 6 and 7 which relate to the making of regulations, the *Payment Card Networks Act*, S.C. 2010, c. 12, s. 1834, is now in force.

TASK FORCE ANNOUNCED TO REVIEW PAYMENTS SYSTEMS

On June 18, 2010 the Minister of Finance announced the launch of the Task Force for the Payments System Review. The task force will review the payments system in Canada. Since Canadians are becoming exposed to different forms of payment, the Department of Finance seeks to ensure that the payments system responds to technology and innovation while continuing to protect consumers and operate efficiently.

Among other things, the task force will:

- Identify public policy objectives for the operation and regulation of the Canadian payments system;

- Assess the regulatory and institutional structures best suited to achieving public policy objectives in the operation and regulation of the payments system;
- Assess the competitive landscape for current participants and identifying any potential barriers to entry;
- Assess the degree of innovation in Canada's payment system and the challenges in bringing innovative products to market; and
- Assess whether consumers and merchants are well served by the Canadian payments system.

The task force has begun work and will shortly begin consultations. It is directed to provide the Minister of Finance with recommendations by the end of 2011. Additional information can be found on <http://www.paymentsystemreview.ca>.

[*Editor's note:* Suhuyini Abudulai is an associate in the Financial Services Group at Cassels Brock & Blackwell LLP. Her practice focuses on corporate finance matters, representing lenders and borrowers in various secured and unsecured financing transactions. Her experience includes syndicated loans, project finance and advising financial institutions in financing and payment card matters. Ms. Abudulai has a specialized practice in consumer protection and privacy, financial institution regulation and payment card and payment systems.

Terry Hall is a partner in the Financial Services Group at Cassels Brock & Blackwell LLP. His practice emphasizes regulatory and transactional matters involving financial service providers and other businesses. Terry frequently advises Canadian and non-Canadian financial institutions on the Canadian regulation of financial services, including the operation of credit, debit and payment card programs, cost of credit disclosure, payments system issues and compliance matters.]