

WILL CONGRESS INTERVENE?

The House Judiciary Antitrust Task Force has held a series of hearings recently relating to the bankcard industry. Below, I will discuss the reason for the hearings and their potential impact on our industry.

Why Are the Hearings Happening?

As the name implies, the House Judiciary Antitrust Task Force (“Task Force”) is a committee in the house of representative that investigates matters relating to antitrust issues. In the case of the hearings relating to the bankcard industry, the antitrust issues concern the prices that are being charged to merchants. As will be explained below, there are a number of groups that are alleging there is some sort of price fixing and/or artificially high prices that are charged to merchants for their credit card processing. The Task Force is holding these hearings in order to gather information about whether or not the accusations are true.

The question becomes how does the bankcard industry find itself in such a situation where it could be subject to regulation through legislation. The answer to that question lies in a number of places. First of all, right now our industry is under a bit of unwanted scrutiny. There are a number of class action lawsuits brought by merchants that are alleging they are being overcharged for their credit card processing services. These lawsuits have been widely reported in the media and are responsible for continuing negative press reports about the industry.

As a result of this increased publicity, the government has taken more of an interest in the bankcard industry. There have been a number of states that are seeking to regulate the termination fees that can be charged upon the termination of a merchant account. One law has actually been passed in Arkansas that may limit termination fees to \$50 and a number of other states are considering similar legislation. The Task Force apparently has been exposed to these press reports and information about the bankcard industry. As a result, the industry finds itself having to justify the rates it is charging merchants and potentially its very existence.

What Are The Hearings:

The Task Force has held a series of hearings to determine whether or not there are any antitrust issues in the bankcard industry. The latest hearing was held on July 19, 2007. In that hearing, a series of speakers provided information either on behalf of the bankcard industry or on behalf of merchants. The speakers were ex-government officials such as the former head of the Federal Trade Commission and also a series of speakers who worked for various merchant advocacy groups. Each group of speakers gave their

positions pro and con about the issue of whether or not merchants are being charged fees that violate antitrust laws.

The speakers providing information on behalf of the bankcard industry focused on how the use of credit cards facilitates commerce because credit cards allow for more goods and services to be sold. In addition, they focused on the ability of consumers to buy goods on credit that they would not otherwise be able to purchase if they had to set up credit accounts with every merchant the consumer wanted to make a purchase from. The speakers also pointed out the fact that government intervention in fixing prices, such as the attempts to set prices during the Nixon administration, has never worked as planned and always leads to more problems than it solves.

As to the merchant groups, they focused on what they call a “hidden tax” imposed on them and consumers by the bankcard industry. These groups called for “transparency” where they could inform consumers about these fees and charge those consumers using credit cards more than other customers. However, as they pointed out those activities are not allowed under the Visa and MasterCard rules. These speakers alleged that credit card fees have increased more than 20% over the past few years. In addition, they stated that in some industries such as grocery markets, the fees paid by the markets to process credit cards (approximately 2%) exceeded the profits made by the markets (approximately 1%) in this low margin industry.

Possible Outcomes:

One possible outcome of all these hearings is that the Task Force will decide not to take any action. This may also occur because the issue will be resolved in another manner through the courts. With all the pending class actions lawsuits on the issue of merchant pricing, the associations may voluntarily enter into a settlement that will change the way merchants are charged and/or reduce the fees paid by merchants. This type of “voluntary” change by the associations may lead the Task Force to believe that legislative intervention is not warranted. In addition, a settlement of the class action lawsuits could be beneficial to the associations because they may be able to have more influence over the final pricing they are able to charge, than if they are faced with a new law that they have little or no input in drafting.

However, if there is legislation on the issue of merchant pricing for credit card processing services, Australia’s experience with that subject can provide some lessons on what might happen here. In Australia, the government passed a law that set a cap on the amount of interchange that the associations could charge to merchants. Interchange before the law had averaged about 95 basis points and the law capped interchange at 55 basis points.

Ironically enough the law had the largest impact on consumers. Merchants got the expected reduction in fees but that reduction in revenue to the card issuing companies had to be made up somewhere. Consequently, card companies increased the fees they charged to cardholders and also increased the interest rates they charged to cardholders. In addition, these companies reduced the rewards paid out to cardholders by 20%. This illustrates that even if the fees to merchants are reduced, it does not mean that the average consumer will see any monetary benefit as a result.

The potential for laws being passed to regulate our industry is one of the greatest threats to the bankcard industry. Between the Task Force and the laws regarding termination fees, we are facing a very real threat to the continued operation and continuity of our industry. We would all be well advised to take this threat seriously and also make a more concerted effort to organize our trade associations and other groups to inform the lawmakers of our position on these issues.

* Paul A. Rianda, Esq. is an attorney who has specialized in providing legal advice to the bankcard industry for over 10 years. For more information about this article or any other matters, please contact Mr. Rianda at www.riandalaw.com, (949) 261-7700 or via email at paul@riandalaw.com

** The information contained herein is for informational purposes only and should not be relied upon in reaching a conclusion in a particular area. The legal principles discussed herein were accurate at the time this article was authored but are subject to change. Please consult an attorney before making a decision using only the information provided in this article.