



## Payment Systems Advisory ■

**AUGUST 14, 2013**

### Update on D.C. District Court's Determination to Vacate Key Provisions of Regulation II<sup>1</sup>

On August 14, 2013, Judge Richard J. Leon of the U.S. District Court for the D.C. Circuit held a status hearing regarding *NACS v. Board of Governors of the Federal Reserve System (NACS v. Board)*.<sup>2</sup> In a memorandum opinion released July 31, 2013, the court held that the Board of Governors of the Federal Reserve ("Board") "clearly disregarded" the intent of Congress in developing the interchange fee limitations and network exclusivity requirements set forth in Regulation II, Debit Card Interchange Fees and Routing ("Regulation II").<sup>3</sup> In its opinion, the court determined that the only appropriate remedy was to vacate the specific provisions of Regulation II at issue and to remand to the Board for development of regulations that meet the statutory standard. However, in recognition of the disruptive effect of the ruling on regulated entities and their commercial relationships, the court stated that it would stay the vacatur of Regulation II in order to permit the Board to develop replacement regulations.

In the August 14 hearing, Judge Leon made clear that his intended purpose for the hearing was to discuss the appropriate duration of the stay of vacatur and whether the Board could issue interim regulations to address the "deficiencies" of Regulation II, including the timeframe within which the related rulemaking process could take place. The attorney for NACS indicated that his client believed that the Board had the authority to issue an interim final rule, and that NACS would support such a rulemaking. Judge Leon suggested that he believed that the Board should be able to enact an interim final rule by the end of August and, after a 30-day comment period, have a final rule in place by the end of October.

However, the attorney for the Board stated that she could not provide the Board's position on whether it could issue an interim final rule, or the timeframe within which it could do so, as the Board has not yet made a determination on these issues. The attorney for the Board also indicated that the Board had not yet decided whether it would appeal the court's ruling. While Judge Leon indicated that he had expected the parties to be prepared to address these

<sup>1</sup> This advisory supplements our advisory regarding the court's memorandum opinion, available at <http://www.alston.com/advisories/NACS-v-Board>.

<sup>2</sup> *NACS v. Bd. of Governors of the Fed'l Res. Sys.*, No. 11-02075, Mem. Op. Jul. 31, 2013.

<sup>3</sup> 12 C.F.R. part 235.

substantive questions during the August 14 status hearing, the attorney for the Board stated it was her belief that the purpose of the hearing was solely to discuss the schedule for briefing the court on these issues.

Judge Leon, who appeared frustrated by the inability of the Board's counsel to answer his questions, stated that the stay of vacatur was only effective until August 14, but that he would continue it for one additional week. He set a follow-up hearing for Wednesday, August 21, 2013, at which he ordered Scott Alvarez, the Board's general counsel, to appear. Judge Leon explained that he expected the Board's counsel to be prepared to provide the Board's position during the August 21 hearing on whether the Board could issue an interim final rule and the timeframe within which the rulemaking process could occur. The parties and amici curiae will then have until August 28 to submit briefs on these issues.

Separately, Judge Leon requested that the parties brief the court on the appropriate remedy to account for interchange fees overcharged to merchants under deficient Regulation II, and if such a remedy includes returning overcharged funds to aggrieved merchants, how the appropriate amounts should be calculated and distributed. Briefs on these issues are due on September 16, 2013.

If you would like to receive future *Payment Systems Advisories* electronically, please forward your contact information to [paymentsystems.advisory@alston.com](mailto:paymentsystems.advisory@alston.com). Be sure to put "subscribe" in the subject line.

If you have any questions or would like additional information, please contact your Alston & Bird attorney or any of the following:

Duncan B. Douglass  
duncan.douglass@alston.com  
404.881.7768

Stephen F. Krebs  
stephen.krebs@alston.com  
202.239.3701

Anthony M. Balloon  
tony.balloon@alston.com  
404.881.7262

Lauren P. Giles  
lauren.giles@alston.com  
404.881.7447

Chris Baugher  
chris.baugher@alston.com  
404.881.7261

Joanna Mangum  
joanna.mangum@alston.com  
404.881.4475

Clifford S. Stanford  
cliff.stanford@alston.com  
404.881.7833

Spencer C. Robinson  
spencer.robinson@alston.com  
404.881.7348

Richard R. Willis  
richard.willis@alston.com  
+32 2 550 3700

William Still  
william.still@alston.com  
404.881.4956

Joseph E. Yesutis  
joseph.yesutis@alston.com  
202.239.3350

M. Christina Young  
christy.young@alston.com  
404.881.4986

## ALSTON & BIRD LLP

[WWW.ALSTON.COM](http://WWW.ALSTON.COM)

© ALSTON & BIRD LLP 2013

ATLANTA: One Atlantic Center ■ 1201 West Peachtree Street ■ Atlanta, Georgia, USA, 30309-3424 ■ 404.881.7000 ■ Fax: 404.881.7777

BRUSSELS: Level 20 Bastion Tower ■ Place du Champ de Mars ■ B-1050 Brussels, BE ■ +32 2 550 3700 ■ Fax: +32 2 550 3719

CHARLOTTE: Bank of America Plaza ■ 101 South Tryon Street ■ Suite 4000 ■ Charlotte, North Carolina, USA, 28280-4000 ■ 704.444.1000 ■ Fax: 704.444.1111

DALLAS: 2828 North Harwood Street ■ 18th Floor ■ Dallas, Texas, USA, 75201 ■ 214.922.3400 ■ Fax: 214.922.3899

LOS ANGELES: 333 South Hope Street ■ 16th Floor ■ Los Angeles, California, USA, 90071-3004 ■ 213.576.1000 ■ Fax: 213-576-1100

NEW YORK: 90 Park Avenue ■ 12th Floor ■ New York, New York, USA, 10016-1387 ■ 212.210.9400 ■ Fax: 212.210.9444

RESEARCH TRIANGLE: 4721 Emperor Blvd. ■ Suite 400 ■ Durham, North Carolina, USA, 27703-85802 ■ 919.862.2200 ■ Fax: 919.862.2260

SILICON VALLEY: 275 Middlefield Road ■ Suite 150 ■ Menlo Park, California, USA, 94025-4004 ■ 650-838-2000 ■ Fax: 650.838.2001

WASHINGTON, DC: The Atlantic Building ■ 950 F Street, NW ■ Washington, DC, USA, 20004-1404 ■ 202.756.3300 ■ Fax: 202.756.3333

VENTURA COUNTY: 2801 Townsgate Road ■ Suite 215 ■ Westlake Village, California, USA, 91361 ■ 805.497.9474 ■ Fax: 805.497.8804