



Payment Systems Advisory ■

SEPTEMBER 23, 2013

D.C. Circuit Grants Expedited Review in *NACS v. Board*; District Court Stays Vacatur of Existing Regulation II Pending Resolution of Appeal¹

On September 19, 2013, the Court of Appeals for the D.C. Circuit granted² the joint motion of the Board of Governors of the Federal Reserve System (the “**Board**”) and the plaintiff merchants (the “**Merchants**”) requesting expedited appeal of the D.C. District Court’s decision in *NACS v. Board*.³ In an order issued the same day, the district court granted the Board’s consent motion (the “**Consent Motion**”) requesting a stay of the district court’s order vacating certain provisions of Regulation II, Debit Card Interchange Fees and Routing (“**Regulation II**”), pending the circuit court’s resolution of the appeal.⁴

In a memorandum opinion issued July 31, 2013, the district court held that the Board “clearly disregarded” the intent of Congress in developing the interchange fee limitations and network exclusivity requirements set forth in Regulation II,⁵ and declared its intent to vacate the applicable provisions of the regulation. Recognizing the disruptive effect of its ruling, the district court temporarily stayed its vacatur order and requested briefing from the parties regarding the appropriate duration of the stay and whether to require issuance of interim regulations pending the development of a permanent replacement for current Regulation II. On August 28, 2013, the Board filed its appeal of the district court’s decision with the circuit court. In addition, the Board filed the Consent Motion with the district court, seeking stay of the vacatur order during the pendency of that appeal. Both the Board and the Merchants filed briefing with the district court in support of the Consent Motion.

On September 19, 2013, the parties filed a Joint Emergency Motion to Expedite Briefing and Consideration of Appeal (the “**Joint Motion**”) with the circuit court. Expedited appeal, although rarely granted, is appropriate if a delay (i) will

¹ This advisory supplements our advisory regarding the district court’s memorandum opinion, available at (<http://www.alston.com/advisories/nacs-v-board/>), and our subsequent updates regarding the August 14 (<http://www.alston.com/advisories/update-DC-district-court/>) and August 21 (<http://www.alston.com/advisories/federal-reserve-appeal-regulation/>) status conferences and associated briefing.

² Order, *NACS v. Bd. of Governors of the Fed’l Res. Sys.*, Docket No. No. 13-5270 (D.C. Cir. 2013).

³ *NACS v. Bd. of Governors of the Fed’l Res. Sys.*, No. 11-02075, Mem. Op. Jul. 31, 2013 (D.D.C. 2013).

⁴ Mem. Order, Docket No. 42, *NACS v. Bd. of Governors of the Fed’l Res. Sys.*, No. 11-02075 (D.D.C. 2013). The district court’s order is dated September 18, 2013, but was filed on September 19, 2013.

⁵ 12 C.F.R. part 235.

cause irreparable injury and there is a substantial challenge to the decision under review or (ii) the public generally or parties not before the court have an unusual interest in prompt resolution of the appeal.⁶ In the Joint Motion, both the Merchants and the Board argued that delay would result in irreparable injury to the parties. The Merchants asserted that each day that current Regulation II remains in effect results in the payment of interchange fees in excess of the statutory limit, and that these overpayments are unlikely to be recoverable regardless of the outcome of the appeal.⁷ The Board added that the district court had not, as of the filing of the Joint Motion, ruled on the parties' request for stay of vacatur, creating the possibility of unregulated interchange during the pendency of the appeal if the district court did not grant the stay request.⁸ The Board also argued that the Board and non-party participants in the debit card system had a strong interest in the timely removal of uncertainty regarding the rules and procedures applicable to debit transactions.⁹ Finally, the Board presented a short summary of its argument on appeal, demonstrating the existence of a substantial challenge to the district court's decision.¹⁰

A few hours after the parties filed the Joint Motion on September 19, the circuit court issued an order (the "**Appeal Order**") granting the Joint Motion and setting an expedited briefing and appeal schedule. The Appeal Order requires the Board to file its initial brief by October 21, 2013, and the Merchants to submit their initial brief by November 20, 2013. Any *amici curiae* that wish to submit briefing in support of a party must comply with that party's briefing deadlines. The Board's reply brief must be filed by December 4, 2013. The circuit court ordered the court clerk to schedule oral argument for an appropriate date after completion of briefing.

As discussed above, both the Board and the Merchants requested that the district court stay its vacatur order during pendency of the appeal. On September 19, 2013, the district court issued an order granting the stay request. Therefore, current Regulation II will remain in effect until the circuit court issues its decision and the district court issues a further order in light of that decision. In the event that further appeal follows the circuit court ruling, the parties will presumably seek an extension of the district court stay to allow completion of the appeal process.

⁶ 28 U.S.C. § 1657.

⁷ Joint Motion at 4-5.

⁸ Joint Motion at 7.

⁹ Joint Motion at 8.

¹⁰ Joint Motion at 8-9.

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