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October 20, 2010

John Read, Chief  
Litigation III  
Antitrust Division  
Department of Justice  
Washington, DC 20530

Comments Re: Civil Action No. CV-10-4496

**RECEIVED**

**OCT 26 2010**

**LITIGATION III, ANTITRUST DIV.  
U.S. DEPT. OF JUSTICE**

Dear Mr. Read:

Thank you for the opportunity to submit comments about the proposed settlement in the above captioned case against MasterCard International and Visa Incorporated.

By way of background, I am a former Assistant Attorney General in consumer protection in Massachusetts, and have been a consumer advocate for the past 33 years. Consumer World is a leading public service consumer education website.

My concerns are twofold and related. The first revolves around ensuring that the discounts authorized by the settlement depending on the consumer's method of payment remain just that – discounts – and not become surcharges above current selling prices thus raising prices for the public. The second revolves around reducing price confusion of customers by requiring clear disclosure of the price to be charged and any discounts applicable to each purchase.

### **I. Preventing Discounts from Becoming Surcharges**

Today, retailers advertise products and services at one stated price, and that price applies to all customers generally irrespective of their method of payment. Put another way, prices today already factor in the costs of debit or credit card use by customers. For example, the Apple iPad is commonly advertised for \$599. Shoppers today can be confident that they will pay no more than the advertised price, irrespective of their method of payment. Some merchants may then choose to further discount the price if the customer chooses to pay by cash, for instance. That then is a bona fide discount.

My concern is that without specific language in the settlement prohibiting surcharges, advertised prices could become “cash only” prices. The effect of that would be that customers who are attracted to those advertised prices might be asked to pay a higher price – a surcharge – if choosing to use plastic. We have all experienced the situation of pulling into a service station after being attracted by a sign promising a low price only to discover that paying with a credit card would cost more per gallon than advertised. The settlement needs to prevent this form of bait advertising and price disclosure.

Take the example again of the Apple iPad generally being advertised and selling for \$599 today, irrespective of the method of payment. If merchants were permitted to advertise “cash only” prices and wanted to garner a bit of extra profit, the net effect would be that customers who purchased the iPad with plastic could be forced to pay a surcharge over today’s prices, despite the fact that the cost of credit was already built into the \$599 price:



To prevent merchants from being able to convert allowed discounts for cash and cheaper forms of plastic into surcharges for using more expensive plastics, the settlement should specifically ban surcharges, and require card issuers to include in their merchant agreement a requirement that advertised and displayed prices must be the price that anyone can pay, irrespective of their method of payment.

Language in Visa’s current merchant agreement, which appears to be expressly excluded under the settlement, while not perfect, appears to have been successful in requiring merchants to only advertise and display prices that are available to everyone, including those who choose to use a credit card:

*“In the U.S. Region, any purchase price advertised or otherwise disclosed by the Merchant must be the price associated with the use of a Visa Card or Visa Electron Card.”*

*A U.S. Merchant may offer a discount as an inducement for a Cardholder to use a means of payment that the Merchant prefers, provided that ...”*

## II. Clear Disclosure of Prices and Discounts

The second concern I have is that prices and discounts for products and services in the future may not be clearly disclosed to customers in advertising, in-store, or online prior to purchase without specific requirements built into the settlement.

This settlement is pushing us into an era of “multi-pricing” whereby the same item may sell for a variety of prices depending on the customer’s chosen method of payment. Pay with a premium credit card, pay more. Pay with a PIN-based debit card, pay less. Pay with a MasterCard, pay one price. Pay with an American Express card, pay another.

It would be an unfortunate consequence of this settlement to see future retail advertising that only included “fuzzy pricing”, so that the customer does not know exactly how much they will be charged:



Similarly, it is unrealistic to expect that any retailer would ever fully disclose in advertising all the various prices that are applicable to an item depending on the customer’s chosen method of payment, if the retailer opted to offer such discounts:



Without some firm disclosure requirements in the settlement, my concern is that there could be mass price confusion because of the multitude of possible prices and discounts that theoretically could be offered.

This raises the question of what price should be disclosed in advertising, what price should be disclosed on items or at the shelf location, and how and where should discounts being offered based on method of payment be disclosed to customers.

As noted in the first section of these comments, to avoid confusion and bait advertising, the price that is available to everyone irrespective of method of payment should be the ONLY advertised price, displayed price, or marked price. This will help prevent merchants from surcharging the price shown, rather than discounting it.

It is a much tougher question to say what the best method of disclosing available discounts are to customers, and how best to disclose the final price that they will be expected to pay. Should there be signs on store shelves generically noting the various discounts? Should there be signs posted throughout the store? Should there be signs at the checkout? Should there be some mechanism whereby customers can find out the final price of their item, including any discount, before checking out?

As a general rule, the more disclosure the better. And at least to answer the last question – yes, customers have a right to know exactly what their final bill is going to be before they reach the checkout.

Through their merchant agreements, card issuers can and should specify disclosure requirements for prices and discounts in advertising, in-store, and online. Before the settlement is finalized, the Justice Department may wish to consult with various consumer organizations such as USPIRG, Consumers Union, Consumer Action, Consumer Federation of America, National Consumers League, and the National Association of Consumer Agency Administrators to help better assess the disclosure options and their preferences.

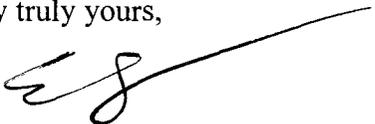
## **Conclusion**

This settlement has broad implications for every retailer and consumer in the country. To help prevent the forthcoming allowable discounts from becoming surcharges – and thus raising prices for customers above current levels if they use plastic – specific language banning surcharges and a requirement that advertised prices be a single price available to anyone, irrespective of the method of payment, should be included in the settlement.

To help avoid price confusion for customers since any single item could sell for a variety of prices depending on the chosen payment method, a way to clearly disclose the various discounts available and a way for customers to determine the actual final selling price of an item before they checkout must be considered for inclusion in the settlement.

Thank you again for the opportunity to comment on the proposed settlement, and I would be happy to answer any questions you might have.

Very truly yours,



Edgar Dworsky  
Founder