

September 21, 2018

What Investors Need to Know About the New \$6.2 Billion Visa, Mastercard Settlement

Visa, Inc., Mastercard, Inc., and other financial institutions have agreed to pay merchants between \$5.56 billion and \$6.26 billion to settle a 13-year old antitrust litigation. For years, the case has driven shrewd investors to transact with retailers seeking to monetize their claims against the card companies. With a much-anticipated settlement now on the table, would-be investors should take note.

On September 18, an amended settlement agreement (the "Settlement") was filed in the US District Court for the Eastern District of New York. The Settlement signals possible resolution of a long-standing lawsuit brought in 2005 by approximately 12 million retailers accusing Visa and Mastercard of improperly inflating interchange fees (also known as swipe fees) charged to retailers. The Settlement modifies a prior settlement agreement approved by the District Court in December 2013.¹

The agreement, reached after a year of active mediation, seeks to remedy the flaws of the prior agreement. Notably, the Settlement limits both the scope and duration of the release. Additionally, it addresses only monetary damages associated with the lawsuit and is not contingent on the resolution of injunctive relief claims, which may be pursued separately.

Under the Settlement, the value of a merchant's claim will be based on the amount of interchange fees attributable to that merchant's Mastercard and Visa payment card transactions during the time period beginning January 1, 2004 up until the preliminary approval date of the Settlement. *Pro rata* payments to merchants who file valid claims will be determined by the amount remaining in the monetary fund after deductions for "opt outs" (as described below) and administrative costs, and by the aggregate dollar amount of claims filed.²

Similar to the prior agreement, the Settlement provides that the monetary fund may be reduced based on the number of merchants that opt out of the class. Up to \$700 million may be returned to the defendants if more than 15 percent of the merchants opt out. If more than 25 percent of merchants opt out, the Settlement may be terminated.

¹ In June 2016, the US Court of Appeals for the Second Circuit invalidated the original settlement on the grounds that certain merchants were not adequately represented because the same counsel had represented separate settlement classes with conflicting interests. The Court of Appeals also took issue with the broad release that would preclude merchants from pursuing certain future claims indefinitely. In March 2017, the Supreme Court declined to hear the case, remanding it back to the District Court for further proceedings.

² The original settlement of \$7.25 billion was, at the time, the largest in history. However, thousands of merchants ultimately opted out, reducing the monetary fund to approximately \$5.3 billion.

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The Settlement is still subject to approval by US District Judge Margo Brodie. If the Court grants preliminary approval, known class members will receive written notice concerning their legal rights. Claim forms are not available at this time.

Katten will keep you apprised of settlement developments and trading considerations. The case is *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, case number 1:05-md-01720, in the US District Court for the Eastern District of New York.

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9/21/18