
SEARS HOLDINGS

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December 9, 2010

John R. Read, Esq.
Chief, Litigation III
Antitrust Division
Department of Justice
450 Fifth Street, N.W.
Washington, DC 20530

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

Re: Notice published pursuant to the Antitrust Procedures and Penalties Act
in the Federal Register on October 13, 2010
Proposed Final Judgment, Stipulation and Competitive Impact Statement
United States of America et al. v. American Express Company, et al.

Dear Mr. Read:

This letter is submitted on behalf of Sears Holdings Corporation (Sears”) in response to the Department of Justice (“DOJ”) publishing in the Federal Register on October 13, 2010 a Proposed Final Judgment, Stipulation and Competitive Impact Statement (“Proposed Final Judgment and Stipulation”) in *United States of America, et al. v. American Express Company, et al.*, Civil Action No. CV-10-4496 pending in the Eastern District of New York. In response to the DOJ’s invitation for comments to the Proposed Final Judgment and Stipulation, Sears is submitting the following comments.

Sears Holdings Corporation is the nation's fourth largest broad line retailer with approximately 3,900 full-line and specialty retail stores in the United States and Canada. Sears Holdings Corporation operates through its subsidiaries, including Sears, Roebuck and Co., Kmart Corporation and Lands’ End, Inc. Sears accepts payments for goods and services through its customers’ use of various payment methods, including credit, charge and debit cards issued through banks that process these cards through the VISA and MasterCard networks, which are the subject of the Proposed Final Judgment and Stipulation. Each of the networks has instituted its own set of operating rules that all merchants who accept these cards must follow and each charges fees based on the type of payment card presented at the merchant’s point of sale.

The “card acceptance fees” or “merchant discount fees” as defined in the Proposed Final Judgment and Stipulation have become the fifth largest expense for Sears Holdings after cost of goods sold. Sears applauds the DOJ (and the participating Plaintiff Attorneys General) for their willingness to engage on these issues and work to remove some of the anti-competitive rules that VISA and MasterCard have imposed on merchants.

Section IV.A.8 of the Proposed Final Judgment and Stipulation prohibits VISA and MasterCard from “engaging in any other practices substantially equivalent” to the prohibitions described in Sections IV.A.1 through IV.A.7 of this Final Judgment.” The interpretation given to this section will ensure that the practices of certain network and issuing banks do not defeat the essential purpose of the Proposed Final Judgment and Stipulation. Sears proposes adding interpretive language to this section so that it will, as intended, give full effect to Section IV.A.1 through IV.A.7.

For example, since merchants will be able to give a discount, or offer a free or discounted product if the customer uses a particular type of general purpose card as allowed in Section IV.A.1 through 7 of the Proposed Final Judgment and Stipulation, we would assume that Section IV.A.8 would be interpreted to require that the networks and issuing banks clearly identify what type of account is being presented to the merchant so that the merchant could readily determine if a discount was warranted. Under current network practices, in many instances this would be impossible today.

VISA and MasterCard issuing banks offer different types of credit and charge cards to their customers. For example, a customer could choose to have a VISA Rewards card that gives rewards to the customer for use of the card anywhere that VISA is accepted. Or, a customer could have a simple VISA card that had no rewards or other incentives for use other than the convenience of having the ability to pay for goods and services over time. Each of these credit or charge cards has a different “card acceptance fee” or “merchant discount fee” that the merchant is charged when the customer presents that type of card at point of sale. Under current practices, the merchant cannot know from the face of the card which type of card is being presented. No requirements exist for issuing banks to clearly identify the type of card being presented, which requirements would permit a merchant to determine whether a discount for use of that card was appropriate.

In fact, the VISA enacted procedures to be able to convert customer accounts from one type of card account to an “upgraded” reward account (that has higher merchant discount fees associated with its use) without changing the account number or the identification of account type on the access device the customer presents to the merchant. The effect of this practice is that merchants cannot identify which type of card account is being presented by the customer, until after the merchant discount fee has already been assessed to the merchant. Absent an interpretation of Section IV.A.8 that would require the payment access device to clearly identify the type of account that was being presented, the merchant’s only remedy to ensure that discounts or incentives were not given inappropriately would be to refuse to give any incentive for a less costly or preferred type of card because the merchant could never be certain that it was being presented with that preferred type. We believe that to give full effect to the intended consumer benefits of the sections IV.A.1-7, section IV.A.8 needs to be broadly interpreted to require that the type of account being presented to the merchant must be clearly identified so that the merchant

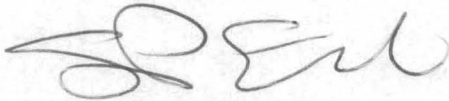
could readily determine upon presentation if a discount or other benefit for the consumer was appropriate as intended by the settlement agreement.

Another practice that has the effect of subverting the Proposed Final Judgment and Stipulation is the lack of standards for identifying commercial debit cards when a merchant wanted to offer a discount for use of a consumer debit card as contemplated by this Final Judgment and Stipulation. The lack of standards precludes the merchant from discerning which cards would qualify for the discount versus those that do not (commercial debit cards which are assessed a much higher merchant discount fee and do not have to be so identified). The business customer might expect a discount for debit not understanding that the merchant only provides a discount for consumer debit because his or her business debit card is not readily identified as a business debit card. This lack of identification would only cause confusion and frustration for the customer at the point of sale and defeat the result contemplated by the proposed Final Judgment and Stipulation, because the merchant could not offer a discount for consumer debit without upsetting the business debit customer who does not understand the interchange difference.

Accordingly, Sears requests that an interpretation to Section IV.A.8 be added requiring that the type of access device presented at point of sale accurately and readily reflect the true nature of the underlying account. Sears requests this interpretation to require transparency to enable merchants to offer their customers the benefits enumerated in Section IV.A.1 through 7.

Sears appreciates the opportunity to comment on the Proposed Final Judgment and Stipulation, and supports the DOJ's and participating Attorneys General efforts to remove anti-competitive network rules that do not foster competition. We respectfully request that the DOJ and the courts require an interpretation of Section IV.A.8 that prohibits network and issuing bank practices that would subvert or defeat the intended results of this Proposed Final Judgment and Stipulation.

Very truly yours,

A handwritten signature in black ink, appearing to read 'SPE', with a stylized flourish at the end.

Susan P. Ehrlich
President – Financial Services
Sears Holdings Corporation