**Agency Fees – Regulator or Market Participant**

A frequent question that has come up is whether an amount an agency charges qualifies as a rule that needs to be spelled out in regulation or whether it falls outside the definition of a rule because the agency is acting in another capacity, such as a market participant.  This question, unfortunately, has not yet been addressed by Indiana courts.  Below, we attempt to provide guidance based on what other courts have found in various circumstances that hopefully will provide insight into how Indiana courts might approach the question.  Agencies are advised to review this summary, the referenced case law, and other research to make their best determination based on the particular circumstances of the fee at issue.

I*. Regulator vs. Market Participant*

At a high-level, the analysis by courts for fees and charges is essentially the same test of whether an agency standard carries the effect of law – in other words, “when it prescribes binding standards of conduct for persons subject to agency authority.”  *Ward v. Carter*, 90 N.E.3d 660, 665 (Ind.), *cert. denied*, 139 S. Ct. 240, 202 L. Ed. 2d 161 (2018).  Courts have used a variety of methods to distinguish between agencies setting standards that carry the effect of law or merely acting as a market participant, including evaluating a formulation of one or more of the following factors:

* The State is acting as the State, not as any market actor
* The State is acting in a regulatory rather than proprietary mode
* There is a contractual relationship between the State and the non-State party
* The State has acted as a private party in a way that the owner of an ordinary commercial enterprise could mimic
* The transaction represents contractual commitment[s] voluntarily undertaken or part and parcel of a governmental program wielding coercive power over private parties
* The agreement results not from ordinary bargaining, but instead from the threat of criminal sanctions or other State power
* The non-State party has an option to opt out
* The State has exercised classic regulatory authority—complete with the use of criminal penalties
* The State is modifying or adding to the legal norm rather than serving as a normal market participant

Distilled down, the more a transaction mirrors the conduct of normal private parties, the less likely the courts are to find it carries the effect of law. For example, in the context of contracts, the U.S. Supreme Court has held that something is a rule:

… when the government employs such a coercive mechanism, available to no private party, it acts with the force and effect of law, whether or not it does so to turn a profit. Only if it forgoes the (distinctively governmental) exercise of legal authority may it escape [being deemed a rule].

*Am. Trucking Associations, Inc. v. City of Los Angeles, Cal.,* 569 U.S. 641, 651-52 (2013). Similarly, the Fifth Circuit established a two-factor test to evaluate whether the government is acting as a market participant:

First, does the challenged action essentially reflect the entity's own interest in its efficient procurement of needed goods and services, as measured by comparison with the typical behavior of private parties in similar circumstances? Second, does the narrow scope of the challenged action defeat an inference that its primary goal was to encourage a general policy rather than address a specific proprietary problem?

*Cardinal Towing & Auto Repaid, Inc. v. City of Beford Tex.*, 180 F.3d 686, 693 (5th Cir. 1999).

II*. Example Analysis – Credit Card Fee*

A common question we have received involves when there is a required charge (e.g., for a license or permit) and an agency assesses a convenience charge for paying by credit card.  Looking at the factors discussed above, there are a variety of ways an agency’s analysis could come out depending on the specific facts.

If an agency offers the option to pay by cash, check, money order, ACH, or credit card and only the credit card carries a convenience charge, the agency should have a very strong argument this is not a rule.  There are multiple options to pay, so no one is required pay the convenience charge to obtain the license.  The charge is being paid for the convenience of paying by credit card and not a requirement of the agency acting as a regulator. The charge is voluntarily undertaken and similar to what is assessed by private parties.

On the other hand, if the only option to pay offered by the agency is credit card so that everyone who wants a license is also assessed the convenience charge, then it starts to feel more like a rule because the only way a regulated party can obtain the underlying license is by paying the fee.  Although the amount of the charge may be similar to what private parties assess, it no longer feels like a voluntary transaction by the regulated party but rather more like something they are required to do.

III*. Additional Reading*

For additional reading, agencies can review the following cases:

California: *Am. Trucking Associations, Inc. v. City of Los Angeles, Cal.,* 569 U.S. 641, 651-52 (2013).

The Trucking Association sued the city of Los Angeles seeking an injunction against five provisions of the concession agreements with the Port and City. Section 14501(c)(1) of the FAAA preempts a state law regulation or other provision having the force or effect of law related to a price, route, or service of any motor carrier, with respect to the transportation of property. The force and effect of law language targets the State acting as a State, not as any market actor so it excludes everyday contractual arrangements.  Here, the Port exercised its regulatory authority complete with use of criminal penalties in imposing the placard and parking requirements at issue here. The contract here functions as part and parcel of a government program wielding coercive power backed by the threat of criminal punishment. Therefore, the concession agreements were expressly preempted by the FAAA as provisions having the force and effect of law.

Illinois: *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 229 (1995).

Members of American Airlines’ frequent flyer program brought a class action suit for breach of contract and consumer protection claims after American Airlines modified their AAdvantage program and devalued credits previously earned. The Airline Deregulation Act prohibits States from enacting or enforcing any law relating to rates, routes, or services. The Supreme Court decided that the Consumer Fraud Act monetary relief could not be granted because the Act serves as a means to guide and police the marketing practices of the airlines, which is preempted by the ADA. However, the breach-of-contract claim was permitted because terms and conditions airlines offer and passengers accept are privately ordered obligations and do not amount to a state’s enactment or enforcement of any law, rule, regulation, standard, or other provision having the force and effect of law within the meaning of the ADA.

Massachusetts: *Building & Constr. Trades Council v. Associated Builders & Contractors of Mass./R. I., Inc.*, 507 U.S. 218, 233 (1993).

The Massachusetts Water Resources Authority (MWRA) had the primary responsibility for a harbor clean-up project. MWRA was to provide the funds for construction, own the sewage treatment facility to be built, establish all bid conditions, decide all contract awards, pay all contractors, and supervise the project. MWRA negotiated with the Building and Construction Trade Council to carry out the project. The Associated Builders and Contractors challenged the bid specifications on the project as preempted by federal law. The court found that MWRA was attempting to ensure an efficient project that would be completed as quickly and effectively as possible. The bid specification constituted proprietary conduct on the part of Massachusetts. Further, the MWRA was acting as a purchaser of construction services, acting as a private contractor would act, and used conditions authorized by Congress; thus, it was not regulating the workings of the market forces. The court stated that MWRA’s bid specification should not be preempted unless it conflicts with federal law or would frustrate the federal scheme or unless Congress sought to occupy the field to the exclusion of the States.

West Virginia: *Air Evac EMS, Inc. v. Cheatham*, 910 F.3d, 751 769 (4th Cir. 2018).

Air Evac EMS sued arguing that West Virginia statutes setting reimbursement rates for air ambulance services regarding workers’ compensation claims, refusing to pay for certain services, and prohibiting direct billing to patients were preempted by federal law and violated the Contracts Clause. The ADA’s preemption clause expressly provides a state may not enact, enforce a law, regulation or other provision having the force and effect of law related to the price, route, or service of an air carrier that may provide air transportation under this subpart. Here, the court found that West Virginia did not act as a private insurer in its regulation of the air ambulance market; it used its coercive power that only sovereigns possess to achieve its goal. The court found that the statute did not establish a voluntary contractual relationship, if a company objected it faced the prospect of enforcement actions against them. If West Virginia does want to bargain for lower payments to air ambulance companies, it would need to use its market power and not its own unique coercive authority to drive the negotiation.

Texas: *Cardinal Towing & Auto Repaid, Inc. v. City of Beford Tex.*, 180 F.3d 686, 693 (5th Cir. 1999)

A towing company that was an unsuccessful bidder on a contract to provide towing services brought an action against the City of Bedford claiming that the city’s contracting ordinance was preempted. Cardinal Towing claimed that the ordinance and contract awarded constituted regulation or a provision having the force and effect of law governing ground transportation and is thus barred under the express preemption clause contained in 49 USC 14501(c). The court found the ordinance and contract specifications were designed only to procure services the city needed, not to regulate the conduct of others. The city acted as a private party that would normally act when seeking a towing service because the city’s ordinance and contract specifications had a connection to the city’s narrow proprietary interest in its own efficient procurement of services.

Illinois: *Fed. Hous. Fin. Agency v. City of Chicago*, 962 F. Supp. 2d 1044, 1052 (N.D. Ill. 2013).

Federal Housing Financing Agency (FHFA) brought suit, on its own behalf and on behalf of the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac), challenging validity of city ordinance requiring the FHFA to file a registration statement with the city for each “vacant” building for which FHFA was mortgagee, and requiring the FHFA to maintain the buildings in accordance with certain standards set forth in the ordinance. The Court found that the registration fee required by the ordinance is an impermissible tax on the federal government, because the revenue from the registration fee “does not go to pay for some service that [the City] renders to [FHFA], or ... to some service that is required by the existence of [FHFA].”

California: *Friends of the Eel River v. North Coast Railroad Authority*, 399 P.3d 37, 73-74 (Cal. 2017).

Two environmental groups filed separate petitions for writs of mandate against a Railroad Authority, which was a state subdivision, alleging the Authority's certification of an environmental impact report (EIR) and approval of a private rail carrier's freight operations on interstate railroad tracks owned by the Authority, together with limited track repairs, violated the California Environmental Quality Act (CEQA). The court noted that when CEQA conditions the issuance of a permit for private development on CEQA compliance, and thereby restricts the ability of private citizens and companies to develop their property, this seems plainly regulatory. But CEQA also operates as a form of self-government when the state or a subdivision of the state is itself the owner of the property and proposes to develop it. Application of CEQA to the public entity charged with developing state property is not classic regulatory behavior, especially when there is no encroachment on the regulatory domain of the federal Surface Transportation Board (STB) or inconsistency with the Interstate Commerce Commission Termination Act (ICCTA).

Ohio: *Sharper v. Tracy*, 647 N.E.2d 550, 552 (Ohio Ct. App. 10th District 1994).

Taxpayer sought declaratory and injunctive relief on claim that income tax exemption for interest on obligations of only Ohio governmental entities violated commerce clause. The court held that income exemption for interest on obligations of Ohio governmental entities, but not non-Ohio governmental entities, did not violate commerce clause. “The market participant doctrine recognizes that when a sovereign acts as a consumer or vendor in commerce, its actions as a market participant are distinct from its actions as a market regulator.” “Clearly, when a state chooses to sell bonds and enter into the securities market, it is acting as a market participant. However, when a state chooses to tax its citizens, it is acting as a market regulator.”

Pennsylvania: *Empire Sanitary Landfill, Inv. V. Com., Dept. of Environmental Resources*, 645 A.2d 413, 418 (Commonwealth Court of Pennsylvania 1994).

Landfill operator and trash hauler challenged county waste-flow control ordinances. One of government’s arguments was that this court should not conclude that the ordinance violates the Commerce Clause because such a result would place in question other contracts the state and its subdivisions enter into with state businesses, such as contracts for schoolbooks and equipment. In such examples, the state argued, the Commerce Clause should not be a constraint as long as the bidding process does not exclude out-of-state businesses. “Although Lehigh County did not apparently engage in a bidding process that excluded out-of-state landfills, the county could not implement the provisions of its contracts with the designated landfills without adopting the county ordinances at issue. Hence, the county, in entering into the contracts with the designated landfills, and adopting its flow control ordinances, is not acting solely as a market participant, but is acting as a regulator.” “Therefore, the market participant doctrine does not apply in this case”.

South Carolina: *Gary Concrete Products, Inc. v. Riley*, 285 S.C. 498, 503 (S.C. 1985) The appellant is a Georgia corporation which manufactures and sells reinforced concrete pipe and was the low bidder on various state contracts; however, the state awarded the contracts to resident bidders as authorized by Code § 11–35–1520(9)(d) (1984). “In the instant matter, the State of South Carolina is acting as a market participant by purchasing reinforced concrete pipe. As a market participant, South Carolina can impose restrictions on itself and not run afoul of the Commerce Clause.” “South Carolina is preferring its own citizens in the purchasing process—a process which, by definition, vaults South Carolina into the marketplace as a market participant.”