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Trade Regulation Rule on Unfair or Deceptive Fees

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Comment from Merchants Payments Coalition

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General Comment

See attached file(s)

Attachments

MPC comment letter on FTC NPRM on unfair or deceptive fees final



February 6, 2024

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue NW
Mail Stop H-144 (Annex J)
Washington, DC 20580

Re: Unfair or Deceptive Fees NPRM, R207011

To whom it may concern at the Federal Trade Commission:

The Merchants Payments Coalition (MPC) appreciates the opportunity to submit this comment in response to the Federal Trade Commission’s (FTC) notice of proposed rulemaking (NPRM) on unfair or deceptive fees. The MPC is a group of retailers, supermarkets, restaurants, drug stores, convenience stores, gas stations, online merchants, hotels and other businesses focused on reforming the U.S. payments system to make it more transparent and competitive.¹ Among its priorities, the MPC has worked to protect American merchants and consumers from excessively high credit card transaction fees that are charged to merchants by card networks and banks and that drive up retail prices paid by consumers. In 2022 alone, merchants were charged \$93.2 billion in transaction fees on Visa and Mastercard credit card transactions—a dramatic year-over-year increase from the \$77.48 billion charged in 2021.² Credit card transaction fees charged to U.S. merchants, which often total more than three percent of the transaction amount, are among the highest in the world—for example, U.S. credit card interchange fee rates range from six to nine times the maximum allowed in the European Union.³ Merchants have extremely limited ability to constrain these fees given the dominant market power of the Visa/Mastercard duopoly, which together control more than 83 percent of the U.S. credit card market.⁴

¹ For more information, see <https://merchantspaymentscoalition.com/>.

² *The Nilson Report*, Issue 1237, “Fees Paid by Merchants in the U.S. – 2022,” March 2023, available at <https://nilsonreport.com/newsletters/1237/>; *The Nilson Report*, Issue 1216, “Merchant Processing Fees in the U.S.-2021,” March 2022, available at <https://nilsonreport.com/articles/merchant-processing-fees-in-the-us-2021/>.

³ See Scott Horsley, “Why many business owners would love it if you stopped using your credit card,” NPR, Sept. 26, 2023, available at <https://www.npr.org/2023/09/26/1201257895/credit-card-fees-visa-mastercard-retailers> (“Fees in the U.S. are eight or nine times as high as those in Europe, says Stanford finance professor Chenzi Xu”); “Visa/Mastercard: US market slow to diversify credit card processing,” *Financial Times*, June 19, 2023, available at <https://www.ft.com/content/cd39458a-9d76-4ad1-84c3-800293fd161a> (assessing that U.S. interchange fees average “about six times more than in the European Union”).

⁴ Board of Governors of the Federal Reserve System, “Report to the Congress on the Profitability of Credit Card Operations of Depository Institutions,” Nov. 2020, at p. 7, available at <https://www.federalreserve.gov/publications/files/ccprofit2020.pdf>.

The MPC submits this comment specifically to urge the FTC not to treat credit card surcharge fees as an unfair and deceptive practice that violates the FTC's final rule. Credit card surcharges are one of the few tools that merchants have to manage the cost of excessive credit card transaction fees without having to raise prices for all consumers. Not only do credit card surcharges signal to consumers that credit cards are costly forms of payment and help steer consumers to other payment methods that do not carry such high transaction fees, but they also help protect those who pay with cash, check, or debit cards from having to bear the inflated cost of credit card transaction fees. This last point is particularly critical because the credit cards that carry the highest merchant transaction fees typically involve cardholder rewards programs, and these rewards cards create a regressive cross-subsidy where non-credit card holders must pay higher prices to cover excessive credit card transaction fees while those who pay with the costly credit cards are rewarded for their cards' use. Importantly, merchants that use credit card surcharges must, and do, comply with state laws that require that the surcharges be clearly disclosed to consumers in advance and that they not be unfair or deceptive. Properly disclosed credit card surcharge fees therefore should not fall within the category of fees that "a consumer *must* pay" under the definition of Total Price in Section 464.1(g) of the proposed rule; when appropriately disclosed, consumers can typically avoid these fees by simply choosing lower-cost forms of payment, and this helps keep prices down for consumers overall.

If the FTC's final rule were to prohibit credit card surcharge fees as an unfair and deceptive practice, it would effectively return to the days of the federal ban on credit card surcharges that Congress enacted in 1976 and permitted to expire in 1984. As discussed herein, numerous consumer advocacy organizations and federal regulatory agencies, including the FTC, raised serious concerns about the federal credit card surcharge ban while it was in place and called for its elimination. As many as a dozen states had also at some point adopted state law prohibitions on credit card surcharges, but several of these state laws have been found by courts to be unconstitutional and currently only three states maintain and enforce such prohibitions. There is widespread recognition today that properly administered credit card surcharges should be an available tool to help merchants manage the high cost of credit cards and to protect cash, check, and debit card users from having to subsidize credit card users.

Make no mistake—surcharges are not the MPC's preferred option for responding to high credit card transaction fees. The MPC is working to secure pro-competitive reforms to the credit card system that would result in far more reasonable credit card transaction fees and that would effectively obviate the need for any credit card surcharges. However, the current reality is that Visa and Mastercard dominate the credit card market and use their market dominance to set excessively high transaction fees that consume much of, or even exceed, merchant profit margins. As long as this reality exists, properly disclosed credit card surcharges that comply with applicable state laws should be preserved as an option for merchants and should not be deemed as an unfair and deceptive failure to disclose the Total Price under the FTC's final rule. Thus, the MPC urges the FTC to approach credit card surcharges differently from other types of fees discussed in the NPRM and not to prohibit them.

This remainder of this comment letter provides information on: (1) Visa's and Mastercard's credit card transaction fees; (2) relevant history on the expired federal credit card surcharge ban and similar state bans, many of which are no longer operative; (3) current state

consumer protection laws that allow credit card surcharges when properly disclosed in advance; and (4) negative impacts to merchants and consumers that would result if credit card surcharges are deemed unfair and deceptive under a final rulemaking.

1. Background on Visa and Mastercard credit card transaction fees

The credit card network market is highly concentrated, and, according to the Federal Reserve Board, it is “dominated by cards issued on the Visa and Mastercard networks, which, combined, accounted for nearly 576 million cards, or about 83 percent of general-purpose credit cards, in 2019.”⁵ Visa and Mastercard were originally created as joint ventures of the banks that issue credit and debit cards, and they worked with their member banks to collectively set transaction fee rates and terms of acceptance for the use of cards bearing their network logos. While Visa and Mastercard are no longer directly owned by their member banks, they still perform the roles of fixing fee rates and terms for all cards issued by all banks and credit unions within their networks.

In essence, Visa and Mastercard set prices on behalf of thousands of card-issuing financial institutions when the issuers charge merchants for card acceptance. Visa and Mastercard also set terms for card acceptance, and these terms often stifle market forces and obscure price signals. And, this activity does not occur on a level playing field, since merchants cannot act collectively when deciding whether and on what basis to accept credit card payments. Few merchants can simply refuse to accept Visa and Mastercard and thereby lose access to the cardholders of the thousands of banks that issue Visa and Mastercard credit cards across the nation. Thus, Visa and Mastercard are largely able to dictate to merchants what fees and terms will be imposed for credit and debit transactions.

Visa and Mastercard have established a series of transaction fees that are deducted from the amounts that consumers pay to merchants on credit and debit card purchases. When a consumer pays \$100 for goods or services from a merchant using a credit card bearing the Visa or Mastercard logo, the merchant first submits the transaction information to the merchant’s bank (called the acquiring bank). The acquiring bank sends this information, via the Visa or Mastercard network, to the bank that issued the card to the consumer (the issuing bank). The issuing bank either authorizes or denies the transaction. If the transaction is authorized, the issuing bank sends to the acquiring bank, via the Visa or Mastercard network, the purchase amount minus a so-called interchange fee that is retained by the issuing bank. Visa and Mastercard also charge a transaction fee called a network fee on each transaction that Visa and Mastercard retain for themselves. After the interchange fee, the network fee, and other processing fees imposed upon the retailer have been deducted from the transaction amount,⁶ the merchant typically only receives about \$97 out of the \$100 sale that was paid for with a credit card. In order to cover the cost of these transaction fees, retailers are compelled to raise the retail

⁵ *Id.* In 2021, \$2.405 trillion in purchase volume was transacted in the U.S. over Visa credit cards and \$1.085 trillion was transacted over Mastercard credit cards. *The Nilson Report*, Issue 1213, “U.S. General Purpose Brands-Purchase Volume,” Feb. 2022, available at https://nilsonreport.com/publication_chart_and_graphs_archive.php.

⁶ These fees are sometimes collectively described as the “merchant discount rate.” The interchange fee is the largest fee charged to merchants on credit card transactions, and in addition to the interchange fee, the network fee, and acquiring bank processing fees, other new fees are periodically created and imposed on merchants by card networks or banks.

price of their goods, meaning that consumers must pay more even if the consumer did not pay with a credit card.

Visa and Mastercard fix interchange fee rates for all card-issuing banks within the Visa and Mastercard networks, typically setting fee rates as a percentage of the transaction amount plus a flat fee. For example, Mastercard's current "Standard" consumer credit interchange fee rate and Visa's current "Non-Qualified Consumer Credit" rate are both 3.15% + \$0.10 per transaction.⁷ Interchange fee rates vary across types of Visa and Mastercard cards and transaction categories, and the rates are typically higher for cards that involve rewards programs for cardholders. Visa and Mastercard post complicated schedules of their interchange fee rates online, but they do not inform merchants or consumers at the point of sale what specific interchange fee rate will be charged for a particular transaction.⁸

Visa, Mastercard, and their card-issuing banks claim that interchange fee income is used to cover card operation costs such as the costs of authorizing, clearing, and settling card transactions, addressing fraud, and operating rewards programs. However, since the fees are fixed by the card network instead of by the banks that actually receive them, the fees do not reflect any particular bank's actual costs and networks have incentive to set fees at levels that provide issuing banks with generous profit in order to incentivize the banks to issue more cards. Of course, banks that issue credit cards also make significant revenue from charging interest and other fees directly to consumers, and that revenue can also be used for both covering card operation costs and for profit.⁹

In addition to centrally fixing interchange fee rates on behalf of all the banks in their networks, Visa and Mastercard both have established network rules that require that merchants who accept any cards within the network must accept all cards within the network. This "honor all cards" rule means that merchants cannot urge consumers to pay with network cards that carry lower interchange fee rates, nor can merchants decline to accept network cards that carry high fee rates. Thus, as more and more Visa and Mastercard rewards cards with higher and higher interchange fee rates are issued, merchants are put in a position where they have to raise prices in order to pay for the fees associated with the cards.

The way that Visa, Mastercard, and their card-issuing banks have structured interchange fees insulate the fees from competitive market forces. The same network-established rate schedule of interchange fees is guaranteed to every card-issuing financial institution in the Visa network, no matter how good or bad the financial institution is at operating a cost-efficient and secure card issuance business. The same is true for the Mastercard network. While other types of fees that banks charge are set by each individual bank in a competitive market environment

⁷ Mastercard 2023-2024 U.S. Region Interchange Programs and Rates, effective April 14, 2023, at p. 2, *available at* <https://www.mastercard.us/content/dam/public/mastercardcom/na/us/en/documents/merchant-rates-2023-2024.pdf>; Visa USA Interchange Reimbursement Fees, Oct. 14, 2023, at p. 9, *available at* <https://usa.visa.com/content/dam/VCOM/download/merchants/visa-usa-interchange-reimbursement-fees.pdf>

⁸ *See id.*

⁹ According to the 2023 CFPB Consumer Credit Card Market Report, "[i]nterest income is the primary revenue source for the card portfolios of major banks...for general purpose card issuers, the next largest line item is interchange income." Consumer Financial Protection Bureau, "The Consumer Credit Card Market," Oct. 2023, at p. 22, *available at* https://files.consumerfinance.gov/f/documents/cfpb_consumer-credit-card-market-report_2023.pdf.

where the payors of the fees can shop around for a lower fee rate, with interchange fees Visa and Mastercard often actually compete with each other to strategically *increase* fee rates so that more banks will issue their cards instead of the other network's cards.¹⁰ Meanwhile, the merchants who pay the fees cannot shop around between card-issuing banks within the Visa and Mastercard networks (because merchants are obligated to honor all cards bearing the network logos), and merchants cannot realistically stay in business without accepting Visa and Mastercard as a form of payment given the networks' market dominance and their status as the gatekeeper to the consumers served by their thousands of member banks.¹¹ And so, each year merchants pay billions more in interchange fees—and because the fees are set as a percentage of the sale amount, they create an inflationary cycle where higher retail prices makes the fees increase and higher fees make retail prices increase. Also, American merchants pay higher credit interchange fee rates than merchants in other countries, as governing bodies in the European Union, Canada, China, Australia, South Korea, Israel, South Africa, and more regulate and limit credit interchange rates.¹²

The interchange fee system that Visa, Mastercard and their card-issuing banks have structured is lucrative both for the issuing banks (who receive billions annually in fees that are insulated from marketplace competition and that are not tethered to any particular bank's actual costs) and for the networks (who receive a network fee each time a card is used and whose high interchange rates motivate issuers to issue more cards and to incentivize cardholders to use them).¹³ But the system is enormously challenging for merchants, who cannot negotiate interchange fees and, even though they typically work in highly competitive markets with narrow profit margins, cannot realistically refuse to accept the dominant Visa and Mastercard networks. And the system is unfair to consumers, who pay billions per year in hidden and ever-rising transaction fees that are passed along to them through higher retail prices. Simply put, if the FTC is concerned about undisclosed fees that ultimately harm consumers, credit card interchange fees are one of the most egregious examples of such fees.

¹⁰ See e.g., Andrew Martin, "How Visa, Using Card Fees, Dominates a Market," *The New York Times*, Jan. 4, 2010 ("What we witnessed was truly a perverse form of competition," said Ronald Congemi, the former chief executive of Star Systems, one of the regional PIN-based networks that struggled to compete with Visa. "They competed on the basis of raising prices. What other industry do you know that gets away with that?"), available at <https://www.nytimes.com/2010/01/05/your-money/credit-and-debit-cards/05visa.html#:~:text=Visa%20and%20MasterCard%20set%20the,shift%20the%20cost%20to%20consumers>.

¹¹ Debit and credit cards are now the most commonly used forms of payment for U.S. consumer transactions. According to The Nilson Report, in 2020 Americans used debit cards for 86 billion consumer payment transactions, credit cards for 41.1 billion transactions, cash for 32.8 billion transactions, and checks for 5 billion transactions. *The Nilson Report*, Issue 1210, "U.S. Consumer Payments," Dec. 2021, chart available at <https://nilsonreport.com/newsletters/1210/>.

¹² See Federal Reserve Bank of Kansas City, "Public Authority Involvement in Payment Card Markets: Various Countries- August 2023 Update," available at https://www.kansascityfed.org/Interchange%20Fees/documents/9753/PublicAuthorityInvolvementPaymentCardMarkets_VariousCountries_August2023Update.pdf.

¹³ Note that there is a structural difference between networks like Visa and Mastercard and "three-party networks" like American Express and Discover, where the network simultaneously serves as the card issuer and acquiring bank. While American Express and Discover also establish interchange fee rates and charge interchange fees, they set such rates on behalf of themselves rather than fixing fees for thousands of separate issuing banks as Visa and Mastercard do, and merchants are able to negotiate directly with American Express and Discover over the fees they charge.

There are a number of steps the FTC could take in collaboration with agency partners such as the Department of Justice (DOJ), Federal Reserve Board, (FRB) and the Consumer Financial Protection Bureau (CFPB) to better protect consumers from, and inform them about, excessive and hidden credit card interchange fees. For example, the FTC's Bureau of Competition can work with the DOJ Antitrust Division to examine and address the barriers to competition posed by Visa's and Mastercard's centralized interchange fee-fixing and their restrictive network rules, including their "honor all cards" rules and their rules which prohibit credit card issuers from enabling more than one credit network to be used on Visa or Mastercard-branded cards. The Bureau of Competition could also examine the antitrust implications of coordination among card networks when it comes to industry standards. The FTC has already taken investigative steps regarding payment card standard setting entities like the PCI Security Standards Council and EMVCo, which are entities controlled by six giant global card networks that impose data security standards for card transactions.¹⁴ These entities set industry standards and specifications that almost always end up favoring the interests of the current dominant networks, and they impact the ability of new potential network competitors to break into the credit card market and offer lower-fee services. Additionally, the FTC, which has enforcement authority under section 920 of the Electronic Fund Transfer Act with respect to payment card networks, can coordinate with the FRB to continue to monitor how card network tokenization requirements may be restricting merchants' and consumers' ability to choose lower-fee network competitors and impeding potential market entrants in both the debit and credit card systems.¹⁵ The FTC's Bureau of Consumer Protection can also use its FTC Act Section 5 authority to investigate inadequate card network disclosures to consumers regarding hidden network-established transaction fees in credit card payments that inflate the prices consumers pay. The Bureau of Consumer Protection can further work alongside the CFPB to provide consumer education information to consumers regarding the hidden fees associated with different payment methods in order to help consumers avoid fraud and deception and make informed choices.

It is worth noting that the *debit* card network market is also highly concentrated and dominated by Visa and Mastercard.¹⁶ However, Congress took meaningful steps in 2010 to rein in excessive debit transaction fees charged by Visa and Mastercard, including by: (1) directing the Federal Reserve Board to place reasonable limits on the interchange fees fixed by networks on behalf of large debit card-issuing banks; (2) preventing debit networks from forming exclusivity agreements with issuers that restrict the number of networks on a debit card to only one; and (3) prohibiting networks and issuers from inhibiting a merchant's ability to choose

¹⁴ See, e.g., FTC Press Release, "FTC To Study Credit Card Industry Data Security Auditing," March 7, 2016, available at <https://www.ftc.gov/news-events/news/press-releases/2016/03/ftc-study-credit-card-industry-data-security-auditing>.

¹⁵ See, e.g., FTC Press Release, "FTC Orders an End to Illegal Mastercard Business Tactics and Requires it to Stop Blocking Competing Debit Card Payment Networks," Dec. 23, 2022, available at <https://www.ftc.gov/news-events/news/press-releases/2022/12/ftc-orders-end-illegal-mastercard-business-tactics-requires-it-stop-blocking-competing-debit-card>.

¹⁶ While there are about a dozen debit card networks operating in the United States, the Justice Department has noted that "the debit payment market is highly concentrated—over 75% of transactions are processed by two firms, Visa and Mastercard." Comments of the United States Department of Justice Before the Board of Governors of the Federal Reserve System, in the matter of Debit Card Interchange Fees and Routing, Docket No. F-1748, RIN 7100-AG15, Aug. 11, 2021, at p. 2, available at <https://www.justice.gov/atr/page/file/1424591/download>.

between debit card networks that are enabled on a card.¹⁷ These Congressionally-enacted reforms have been enforced by federal regulatory agencies, including the FTC which oversees network compliance with these reforms and which has investigated efforts by networks to circumvent them.¹⁸ In contrast to these important reforms and regulatory enforcement actions in the debit market, there have not yet been similar steps taken to address the lack of competition and excessive fees in the credit card system.

2. History of credit card surcharge bans

This section discusses the history of efforts to prohibit credit card surcharge fees, either by law or by card network contractual rules, and explains how such prohibitions have dwindled because of concerns about their negative impacts on merchants and consumers as well as constitutional concerns.

As Professor Adam Levitin has noted in his comprehensive history of credit card merchant restraints, the development of no-surcharge rules within the credit card system took place hand-in-hand with the development of interchange fees. Credit card interchange fees were first introduced in 1971 by the companies that would later become Visa and Mastercard, and the fees were designed in large part “to increase issuer compensation at a time when issuers could not charge higher interest rates because of usury laws.”¹⁹ As Levitin noted, “[t]he interchange fee changed the economics of early card issuance and helped cement it as a profitable undertaking by allowing issuers to get far higher returns than they could with usury restrictions.”²⁰ However, as Levitin observed:

[T]his could only work if merchants were forbidden from passing the fee (as included in the merchant discount fee) on to card users. Otherwise, interchange would appear to be an indirect charge on consumers by issuers that might trigger state usury law violations.²¹

Also, at that time, Regulation Z under the Truth In Lending Act of 1968 (TILA) required lenders, including credit card issuers, to disclose in advance their cards’ finance charge and annual percentage rate (APR) and deemed any difference between the price of cash and credit

¹⁷ These reforms were enacted as part of the Durbin Amendment to the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 and are codified at 15 USC §1693o-2.

¹⁸ For example, on November 22, 2016, Visa agreed to change its network rules in response to an FTC investigation into whether Visa was violating the Durbin Amendment’s nonexclusivity and routing provisions by steering consumers away from PIN debit network competitors. *See* FTC closing letter to Visa, Nov. 22, 2016, *available at* https://www.ftc.gov/system/files/documents/closing_letters/nid/closing_letter_from_james_frost_to_visa_-_11-22-16.pdf. Also, the FTC submitted comments to the Federal Reserve Board in August 2021 encouraging the Board to clarify its regulations to ensure that networks do not circumvent the Durbin Amendment’s requirements for card-not-present transactions. *See* FTC Comment Letter to the Board of Governors of the Federal Reserve System, “Docket No. R-1748, RIN 7100-AG15, Debit Card Interchange Fees and Routing,” Aug. 11, 2021, *available at* <https://www.federalreserve.gov/publications/20210811ftccommentletter.htm>.

¹⁹ Adam J. Levitin, “Priceless? The Economic Costs of Credit Card Merchant Restraints,” 55 UCLA Law Review 1, 57 (2008) (hereinafter “Levitin”).

²⁰ *Id.* at 60.

²¹ *Id.*

transactions to be part of the cost of credit which had to be disclosed in advance.²² According to Levitin, “[a]bsent no-surcharge and no-discount rules, credit card issuers risked violating TILA’s disclosure requirements because they could not control the APR if merchants surcharged or discounted.”²³

As Levitin recounted, “[c]onsumer advocacy groups saw no-surcharge and no-discount rules as negatively affecting cash consumers” and “pressed Congress to amend TILA to allow for cash discounts by not including the discount in the APR.”²⁴ Congress amended TILA in 1974 to exempt cash discounts of up to five percent from the APR, but the Federal Reserve Board, which was tasked with drafting implementing regulations, sought clarity whether the five percent limitation was intended to apply to surcharges as well as discounts. Congress then passed legislation in 1976 amending TILA to clarify that, for a three-year period, “[n]o seller may impose a surcharge on a cardholder who elects to use a credit card in lieu of payment by cash, check, or similar means.”²⁵

The federal credit surcharge prohibition was renewed by Congress in 1978 for an additional three years, but lapsed in February 1981.²⁶ In July 1981, “after considerable debate and the addition. . . of a requirement that a study be prepared by the Federal Reserve Board,” Congress passed a compromise called the Cash Discount Act, which eliminated the five percent limit on cash discounts but reinstated the surcharge ban for a further three years.”²⁷ As Levitin noted, “[m]ajor consumer groups, such as the Consumer Federation of America and Consumers Union, opposed the Cash Discount Act’s continuation of the surcharge ban,” and “[t]he surcharge ban was also opposed by several government agencies, including the Federal Reserve Board, the Federal Trade Commission, the Office of the Comptroller of the Currency, the Federal Home Loan Bank Board, and the Credit Union Administration.”²⁸ Then-FTC Chairman Michael Pertschuk sent a letter to Senator William Proxmire stating the following:

In theory, a discount and a surcharge are equivalent concepts, but one is hidden in the cash price and the other is not. From a practical standpoint, the surcharge seems easier to implement and more likely to ensure that the price credit card users pay reflects the cost of accepting credit cards. If the goal of this legislation is to ensure that cash customers are not required to absorb the extra costs of accepting cards, and thereby subsidize credit card

²² *Id.* at 57.

²³ *Id.*

²⁴ *Id.* at 61-2.

²⁵ Pub. L. No. 94-222, Section 3(c)(1), 90 Stat. 197 (formerly codified at 15 U.S.C. 1666f(a)(2)).

²⁶ Levitin at 64. Note that in 1978, one of the main rationales for the existence of interchange fees dissipated. As Levitin explained, “[i]n 1978, the Supreme Court’s *Marquette* decision gutted state usury laws, but interchange didn’t go away. Instead it became gravy for card issuers who were able to raise their interest rates while maintaining steady interchange revenue....Consumers and merchants didn’t understand the economic model, and banks had no incentive to change.” *Id.* at 60.

²⁷ *Id.* at 63 (internal quotations omitted).

²⁸ *Id.* at 64 and Footnote 220. See also Betsy Horkovich, “The Cash Discount Act: More Than Just A Matter of Semantics,” *University of Dayton Law Review*, Vol. 8, No. 1, Article 6, at 147-8 (1982).

users, then elimination of the current prohibition on surcharges would seem to be one of the most effective methods of obtaining this goal.²⁹

Congress permitted the surcharge ban to expire in 1984.

When the federal surcharge ban temporarily expired in 1981 and as it became apparent that the surcharge ban was likely to be permanently eliminated, the credit card industry urged states to adopt state laws banning credit surcharges.³⁰ Nine states did so in the 1980s, and three more enacted laws later.³¹ Several of these state surcharge prohibitions have since been struck down in court as unconstitutional. In 2015, the 11th Circuit Court of Appeals ruled in *Dana's Railroad Supply v. Attorney General* that Florida's state law allowing cash discounts but prohibiting credit surcharges was a regulation of commercial speech and violated merchants' First Amendment rights.³² The 11th Circuit noted that "surcharges and discounts are nothing more than two sides of the same coin" and "[w]e struggle to identify a plausible governmental interest that would be served by the no-surcharge law, much less one that could be considered substantial."³³ In 2017, the U.S. Supreme Court, in an 8-0 decision in *Expressions Hair Design v. Schneiderman*, reversed the 2nd Circuit Court of Appeals and ruled that New York's state no-surcharge law, which prohibited merchants from charging credit card customers any additional amount above the sticker price if the amount is not also charged to other customers, regulated merchants' speech and was subject to First Amendment scrutiny.³⁴ In 2018, a unanimous panel of the 9th Circuit Court of Appeals held in *Italian Colors Restaurant v. Becerra* that California's no-surcharge law, which allowed cash discounts but prohibited merchants from posting a single sticker price and charging an extra fee for credit card use, violated merchants' First Amendment rights.³⁵ The 9th Circuit in *Italian Colors* noted that:

The law has the effect of allowing retailers to charge credit card users more for the same goods, but only if this price differential is expressed as a discount to cash users. But the higher cost is a result of credit card fees, and referring to the price differential as a discount prevents retailers from accurately conveying that causal relationship. . . . We fail to see how a law

²⁹ S. Rep. No. 97-23, 97th Cong., 1st Sess. 3, at 10-11 (letter from Federal Trade Commission (FTC) Chairman Michael Pertschuk to Senator William Proxmire).

³⁰ Levitin at 63 and Footnote 218. See also *Expressions Hair Design v. Schneiderman*, 975 F. Supp. 2d 430, 449 (S.D.N.Y. 2013) (noting that these state laws "were enacted in the name of consumer protection at the behest of the credit-card industry over the objection of consumer advocates.")

³¹ Levitin at 63-4, Footnote 218.

³² *Dana's R.R. Supply v. Attorney General*, 807 F.3d 1235 (11th Cir. 2015), *reh'g en banc denied* 809 F.3d 1282 (11th Cir. 2016), *cert. denied* 137 S. Ct. 1452 (2017)

³³ *Id.* at 1239, 1249.

³⁴ *Expressions Hair Design v. Schneiderman*, 581 U.S. 37, 137 S. Ct. 1144 (2017). The Supreme Court remanded the case to the 2nd Circuit to determine if New York's law survived First Amendment scrutiny. The 2nd Circuit then certified a question to the New York Court of Appeals, and after the New York Court of Appeals responded the 2nd Circuit requested supplemental briefing. While the supplemental briefs were pending, the plaintiffs informed the defendants that they no longer wished to pursue their claims, and the plaintiffs and defendant New York Attorney General jointly moved the 2nd Circuit to vacate and dismiss the case as moot.

³⁵ *Italian Colors Rest. v. Becerra*, 878 F.3d 1165 (9th Cir. 2018).

that keeps truthful price information from customers increases the accuracy of information in the marketplace.³⁶

The 9th Circuit also weighed arguments that credit surcharges can be deceptive bait-and-switch schemes and observed that properly disclosed surcharges are not deceptive, noting that the plaintiffs in the case “want to *communicate*, not conceal, credit card surcharges.”³⁷ Also, in 2018 and 2021, federal district court judges in Texas and Kansas held that, as applied to certain merchants, Texas’ and Kansas’ similar no-surcharge laws violated the First Amendment.³⁸ And in 2019, Oklahoma’s Attorney General issued an opinion determining that the state’s surcharge prohibition would violate the First Amendment, effectively stopping enforcement of the statute.³⁹ Today, only three states still outright prohibit credit card surcharges,⁴⁰ while several others have laws limiting surcharges to a certain percentage of the transaction amount.⁴¹

In addition to federal and state laws limiting credit surcharges, Visa and Mastercard both for years had network rules prohibiting such surcharges. In December 2013, a federal judge approved a settlement in a class action lawsuit brought by merchants against Visa, Mastercard and several large banks, alleging that the card networks unlawfully conspired with the banks to charge excessive interchange fees.⁴² The case initially settled for \$7.25 billion, which at the time was the largest antitrust settlement in the nation’s history. As a condition of the settlement, Visa and Mastercard agreed to remove their network no-surcharge rules and institute in their place rules permitting merchants to charge surcharges on credit card transactions, to the extent surcharges are not prohibited by state law. Other provisions of the settlement, including the extinguishing of future litigation rights, were controversial and were objected to by many merchants, and the 2nd Circuit reversed the district court’s approval of the settlement;⁴³ however, the change in Visa’s and Mastercard’s network rules to allow credit card surcharges went into effect in April 2013 and those networks’ rules allow surcharges today.

3. Current state laws on credit card surcharges

In the states where credit card surcharges are not prohibited under state law, state disclosure and consumer protection laws help ensure that any such surcharges are appropriately disclosed in advance to consumers. Numerous state attorneys general have announced that undisclosed credit card surcharges may constitute an unfair or deceptive practice prohibited

³⁶ *Id.* at 1177.

³⁷ *Id.*

³⁸ *Rowell v. Paxton*, 336 F. Supp. 3d 724 (W.D. Tex. 2018); *CardX, LLC v. Schmidt*, 522 F. Supp. 3d 929 (D. Kan. 2021).

³⁹ Okla. Att’y Gen. Op. 2019-12 (Dec. 17, 2019)

⁴⁰ See Conn. Gen. Stat. § 42-133ff; Me. Rev. Stat. Ann. Tit. 9-a § 8-509; Mass. Gen. Laws Ann. Ch. 140D, § 28A.

⁴¹ See Colo. Rev. Stat. § 5-2-212 (permitting credit surcharges that do not exceed 2% of the total payment); Minn. Stat. §325G.051 (permitting credit surcharges that do not exceed 5% of the purchase price); N.J.S.A. 56:8-156.1 and -156.2 (permitting surcharges that do not exceed the actual cost to process the credit card payment); NY Gen Bus L § 518 (permitting surcharges that do not exceed the amount charged by the credit card company for card use).

⁴² *In re Payment Card Interchange Fee & Merchant Discount Antitrust Litigation*, 986 F. Supp. 2d 207 (E.D.N.Y. 2013).

⁴³ *In re Payment Card Interchange Fee & Merchant Discount Antitrust*, 827 F.3d 223 (2d Cir. 2016).

under state law,⁴⁴ or have penalized merchants for violating state consumer protection laws by charging a credit card surcharge without properly notifying consumers.⁴⁵

Merchants must, and do, comply with these state consumer protection and disclosure laws and thus are at low risk of deceiving or manipulating consumers. Such properly-disclosed credit surcharges simply communicate to consumers that the cost of credit card usage is high and comes at a price—one which should not be equally borne by consumers who pay with lower-cost forms of payment.

4. Merchants and consumers would be negatively impacted if credit card surcharges are deemed unfair and deceptive under a final rulemaking

This section discusses how the NPRM's approach to credit card surcharge fees could result in harmful impacts on merchants and consumers if such fees are deemed in the final rulemaking to be unfair and deceptive, and explains how the concerns the FTC cited in the NPRM do not justify prohibiting such fees.

With its NPRM, the FTC undertakes the laudable goals of cracking down on schemes that omit mandatory fees from advertised prices and schemes that misrepresent the nature and purpose of fees and charges. The FTC is rightly concerned about practices where hidden mandatory fees are revealed to consumers late in the payment process. However, credit card surcharges that are appropriately disclosed in advance are neither hidden nor mandatory—and, in fact, they are one of the few tools merchants have to push back on Visa's and Mastercard's hidden and mandatory credit card interchange transaction fees. Eliminating the ability to surcharge for credit would exacerbate the regressive cross-subsidy whereby non-credit card paying customers pay higher prices because of others' use of credit cards.

Numerous analyses have shown the already-significant scope of this regressive cross-subsidy. Federal Reserve researchers found in 2020 that “credit card transactions are cross-subsidized by cheaper debit and cash payments” and “consumers in the lowest-income cohort pay the highest net pecuniary cost as a percentage of transaction value, while consumers in the

⁴⁴ See, e.g., Office of California Attorney General Rob Bonta, “Credit Card Surcharges,” (“If a merchant fails to clearly and prominently disclose—before you pay or seek to pay for an item—what it will charge for the item, including any additional fees, that may violate California laws prohibiting deceptive or false advertising.”) available at <https://oag.ca.gov/consumers/general/credit-card-surcharges>; Office of Florida Attorney General Ashley Moody, “How to Protect Yourself: Credit Card Surcharges,” (“Credit card surcharges must be disclosed before purchase...any undisclosed fees may constitute an unfair or deceptive trade practice prohibited by Florida law.”) available at <https://www.myfloridalegal.com/consumer-protection/how-to-protect-yourself-credit-card-surcharges>; Press release, Office of Nevada Attorney General Aaron D. Ford, “Attorney General Ford Advises Nevadans to be on the Lookout for Deceptive Credit Card Surcharges,” Nov. 16, 2020, available at <https://ag.nv.gov/News/PR/2020/Attorney-General-Ford-Advises-Nevadans-to-be-on-the-Lookout-For-Deceptive-Credit-Card-Surcharges/>; Press Release, Office of Tennessee Attorney General Herbert H. Slatery III, “AG Slatery Warns against Deceptive Credit Card Surcharges,” Feb. 12, 2021, available at <https://www.tn.gov/attorneygeneral/news/2021/2/12/pr21-07.html>.

⁴⁵ See, e.g., Press release, Office of New Jersey Attorney General Matthew J. Platkin, “AG Platkin Announces Several Violations at Businesses for Not Accepting Cash and Charging a Credit Card Surcharge Without Required Notice,” Feb. 7, 2023, available at <https://www.njoag.gov/ag-platkin-announces-several-violations-at-businesses-for-not-accepting-cash-and-charging-a-credit-card-surcharge-without-required-notice/>.

highest-income cohort pay the lowest.”⁴⁶ A 2022 study by Federal Reserve researchers estimated that credit card rewards and their associated transaction fees result in “an aggregate annual redistribution of \$15 billion from less to more educated, poorer to richer, and high to low minority areas, widening existing disparities.”⁴⁷ Another study released in 2022 by the Hispanic Leadership Fund found that as a result of credit card rewards and interchange fees, American families earning less than \$75,000 per year send a total of \$3.5 billion to families earning more than \$75,000.⁴⁸ As the New York Times opinion page noted, “the average American at every income level loses more to swipe fee price hikes than they earn in rewards” and “the poorest Americans are still getting handed the worst deal. On average, they pay five times more in price mark-ups than they’ll ever receive in rewards.”⁴⁹ Courts have likewise recognized that “[t]his hidden, regressive subsidy for credit card usage is not insubstantial.”⁵⁰ The FTC should not make this regressive cross-subsidy worse by banning merchants’ ability to surcharge for credit and forcing the high cost of credit card transactions to be baked into retail prices across the board.

The NPRM’s discussion of credit card surcharge fees raises the concern that if a consumer does not know about a restaurant charging a credit card surcharge fee in advance, the consumer might not have the ability to obtain cash on the spot and would have no reasonable choice by to pay the credit card fee.⁵¹ However, state laws already serve to ensure that consumers are appropriately notified in advance about credit card surcharges, thus alleviating this concern. The NPRM also makes the assumption that if credit card surcharges were deemed unfair and deceptive by the FTC, “restaurants would eliminate these fees and adjust menu prices in response.”⁵² Such an adjustment of prices would mean that consumers who pay with cash, check, or debit card would pay more to subsidize consumers who pay with high-cost credit cards (and who often receive rewards for doing so). As Professor Levitin has said, “[e]ssentially, no-surcharge rules increase the price of all other payment systems to match the price of credit cards.”⁵³ We strongly urge the FTC to avoid that outcome because of its harmful effects on merchants and consumers.

⁴⁶ Marie-Helene Felt, Fumiko Hayashi, Joanna Stavins, and Angelika Welte, “Distributional Effects of Payment Card Pricing and Merchant Cost Pass-through in the United States and Canada,” Federal Reserve Bank of Boston Dec. 2020, at p. 4, *available at* <https://www.bostonfed.org/publications/research-department-working-paper/2020/distributional-effects-payment-card-pricing-merchant-cost-pass-through-united-states-canada.aspx>.

⁴⁷ Sumit Agarwal, Andrea Presbitero, André F. Silva, Carlo Wix, “Who Pays For Your rewards? Redistribution in the Credit Card Market,” Dec. 2022, at p. 1, *available at* <https://www.federalreserve.gov/econres/feds/files/2023007pap.pdf>.

⁴⁸ Efraim Berkovich and Zheli He, “Rewarding the Rich: Cross-Subsidies from Interchange Fees,” Hispanic Leadership Fund, May 3, 2022, at p. 1, *available at* https://hispanicleadershipfund.org/wp-content/uploads/2022/05/HLF_Report_RewardingTheRich-InterchangeFees_03May22.pdf.

⁴⁹ “Your Rewards Card Is Actually Bad for You, and for Everyone Else,” *The New York Times*, Nov. 21, 2023, *available at* <https://www.nytimes.com/2023/11/21/opinion/credit-card-rewards-inequality.html>.

⁵⁰ *Expressions Hair Design v. Schneiderman*, 975 F. Supp. 2d 430, 437 (S.D.N.Y. 2013); *see also* Scott Schuh, Oz Shy, & Joanna Stavins, “Who Gains and Who Loses from Credit Card Payments?” Federal Reserve Bank of Boston, Public Policy Discussion Paper No. 10-03, 2010, at p. 21 (“The average cash-paying householder transfers \$149...annually to card users,” each of whom on average “receives a subsidy of \$1,333...annually from cash users.”)

⁵¹ 88 Fed. Reg. at 77472.

⁵² *Id.*

⁵³ Levitin at p. 39.

Conclusion

While the MPC would prefer that pro-competitive reforms to the credit card system obviate the need for merchants to consider using credit card surcharges, that is not the world we currently live in. Nearly \$100 billion in excessively high Visa and Mastercard credit card transaction fees were charged to U.S. merchants in 2022 and were ultimately passed along to consumers in the form of higher prices. These fees are higher than what they would be in a competitive market environment because Visa and Mastercard dominate the market and have structured the fees to insulate them from marketplace competition. In seeking to protect consumers from hidden mandatory fees, the FTC should explore ways to better protect consumers from the harmful impacts of excessive credit card transaction fees imposed on merchants. Eliminating the option of credit card surcharges would unfortunately exacerbate those harms for millions of consumers who use forms of payment other than credit cards. Therefore, rather than the final rule requiring credit card surcharges to be included within the Total Price, we urge that the final rule deem surcharges that are properly disclosed to consumers in accordance with state laws to fall outside the rule's prohibition.

The MPC thanks the FTC for considering this comment. If you have any questions, please do not hesitate to contact us.

Sincerely,

Merchants Payments Coalition