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General Comment

See attached file(s)

Attachments

MAG Comments to FTC RE Unfair or Deceptive Fees NPRM R207011 2.7.24

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February 7, 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

Submitted online through www.regulations.gov

The Merchant Advisory Group (MAG) respectfully submits this letter in response to the Federal Trade Commission's (FTC or Commission) notice of proposed rulemaking on unfair or deceptive fees (NPRM).

The MAG objects to a single aspect of the proposed rule: the decision to bar credit card surcharges as unfair and deceptive "junk fees." The MAG suggests that the final rule should not bar credit card surcharging, at least without further study of the complex dynamics of the payment card industry. Unlike the other fees discussed in the NPRM, credit card surcharges are not mandatory. Customers can avoid them by using cash or a debit card, payment forms which are substantially less expensive for merchants to accept and do not have the regressive features of credit cards. When the "Total Price" is the same for all customers, non-affluent consumers who cannot qualify for credit cards subsidize affluent consumers, an effect magnified by the increasing prevalence of high-priced premium credit cards.

The U.S. is the only major country in the world that does not regulate credit card fees. As a result, U.S. merchants pay among the highest fees in the world.[1] For example, in 2012 the European Commission settled proceedings against Visa and Mastercard with price caps of 0.3% for in-person credit card transactions, a fraction of the cost in the U.S. The European Commission found the settlement "should lead to lower costs for merchants when receiving payments by card" and that the "reduction will also benefit consumers" because "merchants

[1] Federal Reserve Bank of Kansas City, *Public Authority Involvement in Payment Card Markets: Various Countries, August 2023 Update*; CMSPI Insights, *Global Review of Interchange Fee Regulation* (Nov. 2020) at 46.

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normally pass on the merchant service charges, including [default interchange fees], to their customers through higher prices for the goods and services they sell."[2]

Credit card surcharging is far from an ideal solution—merchants would prefer lower fees as a result of competition or regulation. But in the absence of reform or robust competition leading to lower prices, using surcharges to steer customers to cheaper forms of payment is one of the only tools available to merchants to offset the high fees they pay to accept credit cards.

About the MAG. The MAG plays a vital role in helping merchants shape innovative approaches to payments. Providing unparalleled collaboration, the MAG works together with payments industry stakeholders and advocates for merchants' interests. The MAG represents over 190 U.S. merchants which account for over $4.8 trillion in annual sales at over 580,000 locations across the U.S. and online. Roughly $3.5 trillion of those sales are transactions made with over 100 billion card payments, representing approximately 62% of total U.S. card volume.[3] MAG members employ over 14 million people. MAG members play a fundamental role in the monetary and payments ecosystem, competing to offer the highest quality goods and services to consumers for the lowest prices. MAG members are deeply invested in seeing an American financial system that facilitates modern, innovative, and competitive payments.

I. The Concentrated U.S. Credit Card Market Is Marked by High Fees and Low Competition

The MAG applauds the proposed rule's goal of eliminating deceptive mandatory fees that are hidden until the end of the payment process. However, the MAG is concerned about the FTC's decision to include credit card surcharges among unfair and deceptive "junk fees" that should be eliminated, while at the same time the NPRM is silent about the extraordinarily high—and growing—fees merchants pay to accept credit cards. According to one estimate, between 2009 and 2025, merchants' overall costs of acceptance will have doubled, much of it driven by rising

[2] European Commission, *Antitrust: Commission makes Visa Europe's commitments to cut [multilateral interchange] fees and to facilitate cross-border competition legally binding* (Feb. 26, 2014) ("In July 2012 the Commission sent Visa a supplementary statement of objections informing them that the inter-bank fees set by Visa and related practices may violate EU antitrust rules . . . ."); European Commission, *Antitrust: Commission accepts commitments by Mastercard and Visa to cut inter-regional interchange fees* (Apr. 29, 2019) (outlining "The Commitments" made by Visa and Mastercard with respect to interchange fees, which were made "legally binding" by the Commission).

[3] Source of total U.S. card volumes: *2019 Federal Reserve Payments Study*.

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fees and increased use of payment types—primarily premium credit cards—which the payment networks charge higher fees to process.[4]

The MAG shares the Commission's objective set forth in the NPRM "to promote a level playing field that enables comparison shopping and allows honest businesses to compete . . . ."[5] But the NPRM does not address the fact that there is no level playing field as between merchants and the payment card networks that merchants have no choice but to do business with.

The scale of the fees that merchants pay to accept payment cards is staggering. According to the payments industry publication Nilson Report, all forms of payment cards accounted for $10.6 *trillion* in purchase volume in 2022, an increase of over 12% from 2021. But U.S. merchants paid $160.7 billion in processing fees to accept those cards, a nearly 17% increase from the year before. All types of credit cards account for 79% of total processing fees paid by U.S. merchants in 2022, and they are the most expensive forms of card-based payment. In fact, U.S. merchants paid more than $122 billion in 2022 to accept Visa, Mastercard, American Express, and Discover credit cards, paying a tax of 2.25% of all purchase volume over these networks.[6]

The payment card networks do not compete on a level playing field. According to the Federal Reserve, "[t]he general-purpose bank credit card market in the United States 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."[7] These "dominant" networks aggregate the power of thousands of banks through their Honor All Cards (HAC) rules and set centralized, non-negotiable interchange rates for their member banks through default interchange rules that set the price for virtually all transactions. The HAC rules require that to accept one card, a merchant must accept *all* Visa or Mastercard credit or debit cards. Meanwhile, no merchant of any size can do business today without taking payment cards. Combined with their default rules that allow the networks to fix the prices that merchants pay to accept all bank

[4] CMSPI Insights, *U.S. Payments Acceptance Costs Set to Double by 2025* (June 15, 2021).

[5] 88 Fed. Reg. 77438 (Nov. 9, 2023).

[6] Nilson Report, Issue No. 1237 (Mar. 2023) at 14 (showing Visa/Mastercard, American Express, and Discover as the most expensive forms of payment; using Nilson volume and fee data in "Fees Paid by Merchants in 2022" table for weighted average cost).

[7] 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 7; *see also* Nilson Report, Issue No. 1237 (Mar. 2023) at 14 (using Nilson volume and fee data in "Fees Paid by Merchants in 2022" table, Visa and Mastercard account for 76% of general purpose credit card volume).

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members' cards, these networks and issuing banks do not have to compete on a level playing field for the business of merchants.

The high costs of card-based transactions have persisted despite decades of attempts to regulate payment markets and foster competition.[8] As the U.K.'s Payment Systems Regulator found recently, the five-fold price increase imposed on cross-border Visa and Mastercard transactions post-Brexit "is evidence of a lack of effective competition, is not incentivizing any additional innovation and is resulting in higher costs and prices for UK merchants, especially [small merchants] and their customers, to their detriment."[9]

Credit card fees are also regressive. A 2020 working paper from Federal Reserve staff concluded that "credit card transactions are cross-subsidized by cheaper debit and cash payments. Because, compared with low-income consumers, high-income consumers are more likely to hold rewards cards, tend to hold cards with higher rewards levels, and tend to spend more on those cards, these cross-subsidies across payment methods likely become transfers from low-income to high-

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[8] *See*, *e.g.,* Final Judgment as to Defendants Mastercard International Incorporated and Visa Inc., *United States v. American Express Co.*, No. 10-cv-4496-NGG-RER (E.D.N.Y. July 20, 2011), ECF No. 143; *United States v. Visa U.S.A. Inc.,* 344 F.3d 229, 239 (2d Cir. 2003); *In re Visa Check/MasterMoney Antitrust Litig.*, No. 96-cv-5238(JG), 2003 WL 1712568, *3, *4 (E.D.N.Y. Apr. 1, 2003); *United States v. Visa U.S.A. Inc.*, 163 F. Supp. 2d 322, 340, 342 (S.D.N.Y. 2001). Visa's high market shares have particularly persisted in debit despite significant efforts by Congress to increase competition via the Durbin Amendment of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"), codified at 15 U.S.C. § 1693o-2. *See*, *e.g.*, Nilson Report Issue Nos. 1097 (Oct. 2016) at 8, 1191 (Feb. 2021) at 5, 1200 (June 2021) at 7, 1235 (Feb. 2023) at 6, 10, & 1237 (Mar. 2023) at 14 (reflecting Visa's 64% share of U.S. general purpose debit volume in 2010, 59% share in 2020, and 62% share in 2022). The Department of Justice ("DOJ"), in carrying out its mission as one of the two federal agencies charged with enforcing the antitrust laws, noted these debit market realities when it sued to block Visa's acquisition of Plaid under Section 2 of the Sherman Act and Section 7 of the Clayton Act in *United States v. Visa Inc. & Plaid Inc.* (N.D. Cal. filed Nov. 5, 2020) ("DOJ Complaint"). The DOJ Complaint alleged that Visa wielded monopoly power in the debit market, citing the high "entry barriers, coupled with Visa's long-term, restrictive contracts with banks" as "nearly insurmountable" to competitors. DOJ Complaint ¶ 6. The DOJ further alleged that Visa has maintained that power by, among other things, subverting the successful implementation of the Durbin Amendment. *Id.* ¶ 31 ("Visa has responded by imposing new fees on merchants that undermine the effectiveness of the Durbin Amendment's fee caps. Even after enactment of the Durbin Amendment, Visa estimates that it earns an 88% operating margin from its network fees on debit payments, illustrating its durable monopoly power."). According to the DOJ, "the debit network and interchange fees that Visa and its partner banks collect cost U.S. merchants and customers more than $6 billion per year." *Id.* ¶ 28.

[9] Payment Systems Regulator, *Market review of UK-EEA consumer cross-border interchange fees interim report* § 1.13 (Dec. 13, 2023).

income consumers."[10] 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."[11] Courts have recognized that "[t]his hidden, regressive subsidy for credit card usage is not insubstantial."[12] As other researchers at the Federal Reserve calculated in 2010, "On average, each cash-using household pays $149 to card-using households and each card-using household receives $1,133 from cash users every year."[13] Against this backdrop, the FTC should not stop merchants from deploying properly disclosed surcharges for the use of credit cards to deter their use or recoup the high costs directly from their users.

II. <u>Credit Card Surcharging Can Be Valuable to Merchants and Consumers</u>

As one of the enforcers of the antitrust laws and the agency with authority over payment card networks in the debit card market pursuant to the Dodd-Frank Act, the MAG is concerned to see the FTC propose a rule that would reinstate a ban on credit card surcharging after years of litigation to liberalize the rules of the credit card networks and the laws of major states that had long prohibited surcharging at the urging of the credit card networks.[14]

For many years, Visa, Mastercard, and American Express have enforced a variety of "anti-steering" rules to prevent merchants from encouraging their customers to use cheaper forms of payment, including rules against discounting, preferencing, or even disclosing the true cost of

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[10] Marie-Helene Felt, Fumiko Hayashi, Joanna Stavins, & Angelika Welte, *Distributional Effects of Payment Card Pricing and Merchant Cost Pass-through in the United States and Canada*, Federal Reserve Bank of Boston, No. 20-13 (Dec. 2020) at 4 ("consumers in the highest-income cohort pay the least as a percentage of their transaction amount, while consumers in the lowest-income cohort pay the most, suggesting payment card pricing and merchant cost pass-through have regressive distributional effects on consumers").

[11] Sumit Agarwal, Andrea Presbitero, André F. Silva, & Carlo Wix, *Who Pays For Your Rewards? Redistribution in the Credit Card Market*, Finance and Economics Discussion Series 2023-007, Washington: Board of Governors of the Federal Reserve System (Jan. 2023).

[12] *Expressions Hair Design v. Schneiderman*, 975 F. Supp. 2d 430, 449 (S.D.N.Y. 2013).

[13] Scott Schuh, Oz Shy, & Joanna Stavins, *Who Gains and Who Loses from Credit Card Payments?, Theory and Calibrations*, at 1, Federal Reserve Bank of Boston, Public Policy Discussion Paper No. 10-03 (Aug. 31, 2010).

[14] *Expressions Hair Design v. Schneiderman*, 581 U.S. 37, 137 S. Ct. 1144 (2017).

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accepting card payments.[15] These rules have long included no-surcharging rules. While Visa and Mastercard liberalized their no-surcharge rules in 2012 as part of a litigation settlement, their rules still prohibit a merchant from imposing a surcharge that differentiates by issuing bank (for example, surcharging Visa credit cards issued by Chase, but not Visa credit cards issued by Bank of America).[16] This rule is part of a set of restraints that limit competition in the market, including the HAC rules, fixed default interchange, and rules that prohibit merchants from "bypassing" the network on the credit card to connect directly to banks or to use alternative credit card networks.[17]

A ruling issued in January 2024 highlighted the enduring competition problems in the payment card market. The judge overseeing long-running litigation brought by merchants against Visa

[15] *See, e.g.*, *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 986 F. Supp. 2d 207, 215 (E.D.N.Y. 2013) ("In the aggregate, these essentially identical regimes prohibit merchants from informing customers about higher-cost payment cards, incentivizing customers to use lower-cost cards or other forms of payment, or recouping the acceptance costs of the cards the merchants are required to honor."), *rev'd and vacated on other grounds*, 827 F.3d 223 (2d Cir. 2016); *United States v. Am. Express Co.*, 88 F. Supp. 3d 143, 161 (E.D.N.Y. 2015) ("In the late 1980s and early 1990s, however, Amex bolstered its NDPs [anti-steering rules] to ensure that merchants could not state a preference for any GPCC card network other than American Express, and simultaneously intensified its efforts to enforce these provisions when it detected merchant steering."); *rev'd on other grounds*, 838 F.3d 179 (2d Cir. 2016), *aff'd sub nom. Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018); *see also* Visa International Operating Regulations, Core Principle 6.3 (No Surcharging Unless Required by Law) (Oct. 15, 2012); Visa Core Rules and Visa Product and Service Rules (Oct. 14, 2023), 1.5.4.11 (Uniform Services – Merchant Requirement), 1.5.4.12 (Discount Offer – US Region and US Territories), 5.5.1.7 (Similar Treatment of Visa Transactions – US Region and US Territories), 5.5.1.8 (Credit Card Surcharge Requirements – Canada, US Region, and US Territories), 5.5.1.9 (Credit Card Surcharge Maximum Amount – Canada, US Region, and US Territories), 5.5.1.10 (Credit Card Surcharge Disclosure Requirements – Canada, US Region, and US Territories); Mastercard Rules (Dec. 12, 2012), Ch. 15 United States Region Rules, 5.11.2 (Charges to Cardholders); Mastercard Rules (June 6, 2023), Ch. 17 Additional U.S. Region and U.S. Territory Rules, 5.12.1 (Discrimination), 5.12.2 (Charges to Cardholders), 5.12.2.1 (Brand-level Surcharging), 5.12.2.2 (Product-level Surcharging), 5.12.2.3 (Requirements for Merchant Disclosure of a Surcharge at the POI); American Express Merchant Reference Guide, U.S. (Oct. 2023), 3.1 (Treatment of the American Express Brand); Interlink Core Rules and Interlink Product and Service Rules, 1.5.5.2 (Surcharges), 5.1.1.5 (Permitted Merchant Surcharging) (Oct. 14, 2023).

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

[17] The no-bypass rule is currently the subject of proposed legislation that would require the country's largest banks (those with over $100 billion in assets) to enable a second, unaffiliated credit card network. *See* S.1838 – Credit Card Competition Act of 2023; H.R.3881 – Credit Card Competition Act of 2023.

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and Mastercard concluded that, after years of discovery, the merchants had presented a "mountain of evidence" sufficient for a jury to conclude that "prices are higher than one would expect to find in a competitive market" and "more than enough evidence" of reduced output, "stifled competition and reduced quality," all to the detriment of U.S. consumers.[18]

Among the evidence from the fact and expert record in the case, the court observed that after Visa and Mastercard liberalized their surcharging rules in 2012, "several large merchants threatened to begin imposing surcharges on Visa cards" which "resulted in lower prices for these merchants . . . ."[19] The court cited expert opinion in the case that, without the network rules at issue (including restrictions on surcharging), "cardholders would have to internalize the cost of using rewards cards (*i.e.*, through surcharging), and would switch to alternative payment means, increasing the number of debit transactions" which are less expensive for merchants.[20] According to the evidence cited by the court, some merchants were able to negotiate lower fees by deploying the threat of surcharging, without ever having to impose them on their customers.

There is similar evidence from Australia. When regulators in Australia imposed price caps on Visa and Mastercard, the government also allowed merchants to surcharge high-fee Visa, Mastercard, and American Express transactions.[21] Australian regulators explained that "[t]he right of merchants to surcharge for expensive payment methods is important for payments system efficiency and helps to hold down the cost of goods and services to consumers generally."[22] The Reserve Bank of Australia (RBA) also concluded that its regulatory scheme—which reduced prices to a fraction of what U.S. merchants pay—has not "been associated with any decline in the quality of services offered to end users."[23] In addition, consumers benefited from lower payment card fees, because "[j]ust as other types of input costs feed through to final prices faced by consumers, the reduction in payment costs resulting from Australia's reforms will have fed through into lower prices for all consumers, regardless of what payment method they use."[24]

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[18] *In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig.*, No. 05-MD-1720 (MKB)(JAM), 2024 WL 278565, at *29, 33, 36 (E.D.N.Y. Jan. 25, 2024).

[19] *Id.* at *22.

[20] *Id.* at *32; *see also id.* at *35 (citing expert opinion that merchants could use surcharges to introduce "competitive pressure to keep merchant fees low").

[21] RBA, *Review of Card Payments Regulation, Conclusions Paper* (May 2016) at 1-2, 9.

[22] *Id.* at 2.

[23] *Id.* at 9.

[24] *Id.*

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Importantly, the RBA recently reviewed the payments system reforms imposed, and concluded that "While many merchants choose not to surcharge card payments, having the right to do so can help lower their payment costs and promotes competition between card schemes."[25]

Surcharging is one form of steering that merchants may choose to employ to encourage their customers to pay with less expensive forms of payment. Imposing credit card surcharges is not any merchant's preferred option to reduce the costs of accepting credit cards—merchants would much prefer to bring acceptance costs down in a truly competitive market for their business. But there are few tools in the merchant toolkit to combat the rising cost of card payments. If applied correctly, surcharging can also help protect cash and debit card users from subsidizing the cost of high-cost rewards cards.

The MAG is particularly concerned by the NPRM's discussion of credit card surcharge fees, as the issue was not the subject of the advance notice of proposed rulemaking. The NPRM only discusses credit card fees in the context of restaurants, but the text of the proposed rule would apply to all merchants. The ability to properly disclose surcharges—and deploy them fairly and effectively to steer customers to lower-cost forms of payment—varies widely among merchants and should not be the subject of an outright ban applicable to "business[es]," defined by the NPRM as any entity that "offers goods or services . . . ."[26]

In support of the broad proposed rule barring credit card surcharges, the NPRM raises the specific 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 but to accept and pay the unexpected credit card fee."[27] As a general matter, state laws already serve to ensure that consumers are appropriately notified in advance about credit card surcharges. And, while the diversity of merchants is vast, many small businesses today deploy ATMs to facilitate the use of the cash and the avoidance of credit card surcharges.[28] Like all MAG members—who are among the largest merchants in the U.S.—

[25] RBA, *Review of Retail Payments Regulation, Conclusions Paper* (Oct. 2021) at 4.

[26] 88 Fed. Reg. at 77483, proposed 16 CFR 464.1(b).

[27] 88 Fed. Reg. at 77472.

[28] *See e.g.*, Luke Goldstein, *Small Businesses Rise to Fight Wall Street*, American Prospect (Feb. 7, 2023) ("Some shops try to incentivize consumers to use cash through discounts or by providing ATMs, but most businesses . . . can't afford to turn away cards entirely."); *see also*, *e.g.*, Kristina Partsinevelos & Cait Freda, *How small businesses are fighting inflated credit card swipe fees*, CNBC (Feb. 9, 2023) (some merchants are posting signs about credit card acceptance costs and prompting for payment in cash).

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restaurants generally depend on repeat customers. If customers are unhappy because they were unaware of properly disclosed surcharges for the use of credit cards—or because they insist on using credit cards and do not want to pay the true cost of these cards—restaurants will quickly learn not to deploy these types of steering techniques in the face of lost sales. Merchants that use credit card surcharges must comply with state laws that require that 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 proposed 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 could help keep prices down for consumers overall.

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."[29] This is exactly what happens throughout the retail economy today—prices that are the same for all payment forms mean that consumers who pay with cash, check or debit card pay more to subsidize consumers who pay with high-cost credit cards (and who often receive rewards for doing so). The FTC should avoid that outcome, as it is harmful both for merchants and consumers.

The recent reported increase in surcharging is a symptom of a lack of competition in the payment card market in the U.S., where the use of electronic payments is increasing rapidly, driving up merchant costs.[30] The pandemic accelerated the shift to card-not-present transaction types, which are more expensive for merchants to accept even though merchants bear the risk of fraud for these transactions. The fact that card-not-present transactions are priced far above card-present transactions is an indication of the lack of competition—the price difference is far higher than any increase in cost due to fraud. Rather, the high price of these online or in-app transactions is based on the fact that the merchant cannot accept cash as an alternative. Card-present and card-not-present transactions have essentially the same cost to issuers and card networks.

[29] 88 Fed. Reg. at 77472.

[30] The incidence of surcharging appears to be increasing. *See, e.g.*, PYMNTS & Payroc, *Credit Card Surcharges: How Cardholders React to Extra Costs* (Feb. 2022) at 4 ("Nearly half of credit card holders have paid a surcharge at least once at a store or restaurant.").

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The increase in card-not-present volume stemmed from a massive shift to online shopping, which also was accompanied by a shift toward contactless forms of payment in-store.[31] Retailers adapted quickly to the pandemic by investing in new forms of shopping such as buy-online-pick-up-in-store ("BOPIS") and implementing take-out and delivery in new segments. As a senior Visa executive told investors, "we've pulled forward three, four, five years of customer habituation and muscle memory formation," which has not subsided after the pandemic.[32] Merchants operated under tremendous strain during the pandemic. Some navigated intermittent and unpredictable store closures and lay-offs, while others faced huge spikes in demand offset by persistent supply chain disruptions. Retailers had to quickly learn how to operate during a global health crisis challenging the safety of their employees and customers, with constantly evolving health and safety protocols.[33]

The shift to card-not-present forms of payment increased costs for merchants. Those fees have risen sharply, particularly on digital transactions. This increase in merchant-side fees has occurred despite lower issuing bank costs for card transactions.[34] The resulting increased disparity between processing costs, interest expenses, and fees charged to merchants underscores that the payment markets are not functioning fairly in the U.S. Because they operate in highly competitive, low-margin environments, merchants are forced to pass these fees on to consumers in the form of higher retail prices.[35]

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[31] *See, e.g.*, *Mastercard New Payments Index: Consumer Appetite for Digital Payments Takes Off*, Business Wire (May 4, 2021); Kate Fitzgerald, *Mastercard sees contactless acceptance triple in U.S., Brazil*, American Banker (May 5, 2021).

[32] Oliver Jenkyn, Executive Vice President & Group President & Regional President-North America, Visa Inc. at Morgan Stanley Technology, Media and Telecom Conference (Corrected Transcript) (Mar. 1, 2021) at 4; *see also* Visa Inc. at Wells Fargo TMT Summit (Corrected Transcript) (Dec. 1, 2020) at 7 ("[W]e have probably pulled forward three years' worth of behavioral change into one year as a result of the pandemic."); Terri Bradford, *Are Contactless Payments Finally Poised for Adoption?*, Federal Reserve Bank of Kansas City, Payments System Research Briefing (Apr. 14, 2021) (discussing the rise in contactless payments and noting surveys indicating that consumers do not expect to revert).

[33] *See, e.g.*, Jason Goldberg, *The Impact of Covid-19 On U.S. Brands and Retailers*, Forbes (Mar. 29, 2020); Phil Wahba, *A record 12,200 U.S. stores closed in 2020 as e-commerce, pandemic changed retail forever*, Fortune (Jan. 7, 2021).

[34] For debit transactions, where the Federal Reserve requires cost reporting under Regulation II, issuing bank costs halved, from $0.077 in 2009 to $0.039 in 2021. *See* Board of Governors of the Federal Reserve System, *2021 Interchange Fee Revenue, Covered Issuer Costs, and Covered Issuer and Merchant Fraud Losses Related to Debit Card Transactions* (Oct. 2023) at 24.

[35] *See, e.g.*, Comments of the United States Department of Justice, *Debit Card Interchange Fees and Routing, Docket No. R-1748, RIN 7100-AG15* (Aug. 11, 2021) at 2 ("Lacking competitive alternatives [to

The current marketplace lacks the competition necessary for the free market to set appropriate pricing. This lack of competition has harmed U.S. consumers and the economy. Without real reform or increased competition, merchants will continue to pay some of the highest costs of acceptance in the world while experiencing some of the highest rates of fraud.[36] As the use of traditional cash decreases, payment card networks and banks will likely continue to impose fee increases for digital purchases, where competition is most limited.[37]

The MAG believes that, under these circumstances, merchants should not be prohibited from using credit card surcharges—or the threat of doing so—in an attempt to lower their cost to accept credit cards.

* * * *

<u>Conclusion</u>. The MAG and its merchant members appreciate the Commission's consideration of this important topic, and we look forward to working with the FTC throughout the rulemaking process.

Sincerely,

John Drechny
CEO
Merchant Advisory Group

Visa and Mastercard], merchants must pay higher transaction fees that are passed on to consumers in the price of goods and services.").

[36] *See* Nilson Report Issue No. 1254 (Dec. 2023) at 6 ("The US accounted for 25.21% of global card volume in 2022 but 40.69% of worldwide fraud losses.").

[37] *See*, *e.g.*, CMSPI insights, *Online Routing: The Barriers Costing Retailers $3.1bn a Year* (June 5, 2020); Jennifer Surane, *Visa Changes Rules for Gas Stations to Avoid $125 Pump Limit*, Bloomberg (Apr. 1, 2022) (quoting a Mastercard statement that justifies increases in digital fees on the basis that "electronic payments have proven even more valuable since the start of the pandemic").