

Representative Angus K. L. McKelvey, Chair
Representative Derek S. K. Kawakami, Vice Chair
Committee on Consumer Protection & Commerce



HEARING Monday, March 25, 2013
 3:00 pm
 Conference Room 325
 State Capitol, Honolulu, Hawaii 96813

RE: **SB470, SD2, HD1 Relating to Credit Cards**

Chair McKelvey, Vice Chair Kawakami, and Members of the Committee:

Retail Merchants of Hawaii (RMH) is a not-for-profit trade organization representing 200 members and over 2,000 storefronts, and is committed to support the retail industry and business in general in Hawaii. The retail industry is one of the largest employers in the state, employing 25% of the labor force.

RMH understands and shares the Legislature's concerns about the surcharging issue and the desire to protect Hawaii's consumers. **We believe this measure is unnecessary and offer the following comments on SB470, SD1, HD1**, which prohibits retailers from imposing credit card surcharges in certain instances.

The Credit Card Fees lawsuit was filed by merchants in an attempt to lower credit card swipe fees, and in turn, operational costs that contribute to higher consumer prices. The much-touted settlement is still in dispute, and in reality does nothing to control swipe fees.

Ten states have similar prohibition statutes in place and at least fourteen others have bills under consideration. In conversations with our members, RMH has determined that while there may be exceptions, retailers in general have no intention of imposing surcharges on our customers. Doing so will put any retailer at a serious disadvantage in this highly competitive arena.

- Existing merchant agreements with VISA/MasterCard require retailers to handle credit cards the **same in every store**, regardless of location. This provision automatically bars any retailer that has even one location in a state with a surcharge ban.
- The settlement states that if a merchant is going to surcharge VISA/MasterCard they must also surcharge any other card with an equal or higher swipe fee, i.e., American Express. However, American Express operating rules require that any surcharge must be applied to all cards, even debit cards. And surcharging debit cards is prohibited by the settlement.
- Stores that are not included in the previously noted points and that are inclined to impose surcharges must comply with the settlement's requirements: 1) notify VISA/MasterCard of their intent to do so at least 30 days prior to surcharging; 2) limit surcharging to credit cards only (not allowed for debit or prepaid cards; 3) limit the amount to the merchant's particular discount rate (interchange rate) for each applicable credit card surcharged; 4) disclose the surcharge as a merchant fee and clearly alert consumers to the practice at the point of sale and on every receipt. The process is costly, cumbersome, time-consuming, and will most likely alienate customers.

Thank you for your consideration and for the opportunity to comment on this measure.

Carol Pregill, President



HAWAII FOOD INDUSTRY ASSOCIATION (HFIA)

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TO: COMMITTEE ON CONSUMER PROTECTION & COMMERCE
Rep. Angus L.K. McKelvey, Chair
Rep. Derek S.K. Kawakami, Vice Chair

FROM: HAWAII FOOD INDUSTRY ASSOCIATION
Lauren Zirbel, Executive Director

DATE: Monday, March 25, 2013

TIME: 3:00 p.m.

PLACE: Conference Room 325

RE: SB 470, SD 1, HD 1 RELATING TO CREDIT CARDS

Position: Comments

The Hawaii Food Industry Association is comprised of two hundred member companies representing retailers, suppliers, producers and distributors of food and beverage related products in the State of Hawaii.

As part of a proposed settlement agreement reached in antitrust litigation against Visa and MasterCard, and a number of large U.S. banks, both card brands agreed to relax their network rules regarding merchant prohibitions on surcharging on credit cards (debit is not included). The proposed settlement agreement was reached in July 2012, and granted preliminary approval by the Court in November. The card brands agreed to relax the surcharging prohibitions as of January 27, 2013. View the Visa rule changes [here](#) and the MasterCard rule changes [here](#).

Surcharging is not the answer to centrally price-fixed swipe fees that inflate prices for all merchants and all consumers. Merchants do not want to be the collection agents for over-inflated bank fees. Merchants want a competitive market. If we had that, then the fees would fall dramatically.

The proposed settlement agreement is severely flawed and does very little, if anything, to fix a broken marketplace that's been negatively impacting the merchant community for well over a decade as we've seen per transaction costs triple over the last several years alone. Card acceptance fees are on average the second-highest operating cost for merchants across the country, and one of the fastest growing year over year

Our members have emphatically said they're not interested in surcharging. Even if they wanted to, Visa and MasterCard have put barriers in place so it can't happen for most merchants.

Merchants still don't know what the fees are on specific cards they get in their stores. Without knowing that, implementing the surcharging provisions is virtually impossible. In a 2009 report, GAO found that Visa had over 60 credit card interchange rates, and MasterCard has over 240. If anything, this system has become even more complicated since then.

Currently, ten states – California, Colorado, Connecticut, Florida, Kansas, Maine, Massachusetts, New York, Oklahoma, and Texas – prohibit surcharging. These states represent over 40% of total card sales across all industries. Merchants that operate in those ten states (virtually all national and many regional chains) will not be able to surcharge anywhere because Visa and MasterCard require merchants to surcharge all of their sales – or none at all.

Any merchant who accepts American Express will not be able to surcharge due to AmEx operating rules (which would require even debit cards to be surcharged in order for any cards to be surcharged)¹ that are currently the subject of litigation by the Department of Justice. That case is not expected to go to trial until 2014. If AmEx wins, the surcharging provisions negotiated in the antitrust litigation will remain completely unworkable.

Visa and MasterCard are requiring that merchants give them 30 days notice prior to surcharging. Surcharging is not going to happen overnight. Also, this will intimidate small merchants so that they won't want to surcharge.

The surcharging provisions of the proposed settlement are also intended to hurt new potential competitors to Visa and MasterCard. Merchants that want to surcharge, for example, will be prohibited from accepting (or will have to stop accepting) Paypal - or any other emerging payments options that prohibit surcharging - in their stores.

The surcharging provisions are just another example of Visa and MasterCard tricks and traps. In making these changes to their network rules, they also sneakily changed the definitions of their covered products applicable not just to surcharging, but to all facets of their merchant operating rules, including mobile payments. This creates a danger that Visa and MasterCard will require merchants to accept their preferred mobile payment solution and stifle innovation in an area that has the promise to bring some new ideas to market.

The last thing we want to see happen is a for the Visa/MasterCard duopoly to stifle the innovation we're seeing from new players in the mobile payments space, and cement their stranglehold and broken business model in this new, emerging marketplace. The types of tricks and traps we see here are all the more reason lawmakers and federal agencies need to more closely scrutinize the actions of these major companies now and in the future as they could be given significant immunity from private legal action if the proposed antitrust settlement were to be approved by the court.

Thank you for the opportunity to testify.

¹ Mandelbaum, Robb. [Visa and MasterCard Settle Lawsuit, but Merchants Aren't Celebrating](#). *New York Times*. August 8, 2012.

Presentation to
Committee on Consumer Protection & Commerce
March 25, 2013 at 3:00 pm
State Capitol Conference Room 325

Testimony in SUPPORT of S. B. 470, SD2, HD1

TO: The Honorable Angus L. K. McKelvey, Chair
The Honorable Derek S. K. Kawakami, Vice Chair
Members of the Committee

My name is Edward Pei and I am the Executive Director of the Hawaii Bankers Association (HBA). HBA is the trade association representing all FDIC insured depository institutions operating in the State of Hawaii.

Since its inception, MasterCard and Visa has prohibited the surcharging of credit card transactions to assure that credit card users were not penalized by the merchant for using a credit card to make their purchase. Effective January 28, 2013, this ban was lifted, allowing merchants now to add a "Checkout Fee" to the transaction, should their customer opt to use a credit card as their payment device. While the ban has been lifted by the bank card associations, 10 states have instituted a ban on surcharging and many other states have bills pending to implement the ban. We believe Hawaii should also implement this ban against surcharging.

Customers have choices today at the point of sale but one of the most convenient is the credit card. It is also easier and safer to use than other payment devices. Implementing a surcharge, or "checkout fee", will discourage and prevent some customers from using their credit cards. Customers should continue to have the freedom and the option to choose whatever payment device works best for them, without any financial penalties influencing their decision. Some merchants, like hotels, rental cars and many online merchants, virtually require a credit card for their purchases and giving them the ability to assess an additional fee for the transaction would simply provide unjust enrichment for the merchant.

In summary, we support SB 470, SD2, HD1 and the right of our consumers to use their payment device of choice to complete transactions at the point of sale. Please let us know if you would like any further information on this matter.

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Testimony Regarding SB470 SD1 HD1 Credit Card Companies' "Hidden Fee" Legislation

Committee on Consumer Protection and Commerce
Monday, March 25, 2013

Introduction and Overview:

Mr. Chairman and members of the committee, thank you for the opportunity to testify about this important issue that impacts businesses, consumers, and our economy as a whole.

The issue before the committee likely impacted you today when you made a purchase at a local store, bought your morning cup of coffee, or paid for your lunch. Each of you made a choice at the checkout counter. Some of you used cash, some a check or debit card, and others a credit card, maybe to pick up some frequent flier miles or reward points.

If you looked at your receipt, you would find the price of the item(s) you purchased, a breakdown of the applicable taxes, and the total amount. However, nowhere on the receipt does it tell you what your method of payment cost the merchant and what it cost you.

This hidden fee is built into nearly every transaction between businesses and consumers because of anticompetitive credit card agreements. The legislation before you would turn anti-consumer agreements into anti-consumer state law.

Proponents of this legislation will refer to this as "no surcharge" legislation. To many of you – and to a lot of consumers – that sounds pretty good at first, especially after the proponents pushing for this legislation make claims about how it will help keep prices low and protect consumers from fees at the checkout counter.

The problem with those claims (and the misleading name) is that they just aren't true.

Today, large financial institutions are sheltered from engaging in meaningful price competition, placing credit cards beyond the reach of market forces. Businesses cannot negotiate with the dominant credit card companies for lower fees by threatening to steer consumers to a lower cost payment form because their agreements preclude them from doing so.

This legislation isn't about protecting consumers; it is about credit card companies fighting to protect anti-competitive pricing practices that increase fees for businesses and drive up prices for consumers. This "hidden fee" legislation would replace transparency with secret fees, and discount opportunities with higher prices.

This hidden fee legislation seems to be part of an effort to undo key marketplace reforms included in a recent \$7.2 billion settlement agreed to by MasterCard and Visa.

Why the Recent Settlement is Important:

The reforms included in this settlement increase competition, provide consumers new transparency, and give businesses the freedom to price their goods and services according to real costs – and inform customers of where their money is actually going – not toward a good or service, but to a credit card company.

We believe that a strong economy requires a level playing field that empowers consumers with transparency and lower-cost choices, promotes a free market and increases competition, and lowers fees for businesses and lowers prices for consumers.

That's what the recent settlement with Visa and MasterCard begins to do. It creates smart reforms that would:

- *Eliminate some of the anticompetitive agreements that shelter credit card companies from competition.*
- *Increase transparency for consumers and provide them with information about how their chosen payment method impacts the price of goods and services.*
- *Allow businesses to educate customers about how their choice of payment method impacts the price of goods and services.*
- *Give businesses the freedom to adjust their prices according to payment method selected. The settlement sets forth strict disclosure requirements and caps the amount a business can charge for more expensive payment options.*
- *Promote competition that would put downward pressure on swipe fees and help reduce business costs.*

This settlement does not eliminate credit cards. It simply provides greater transparency and choice for consumers.

Individuals that choose less-expensive payment methods, pay less for goods and services. Those who choose to use premium cards and enjoy their perks, may pay more for that privilege if businesses decide to price their goods and services to reflect the payment method. It's as simple as that.

Make no mistake: the legislation before you today aims to unravel these pro-consumer reforms by eliminating the benefits of the recent settlement, essentially making it null and void to credit card companies. This proposal would keep the current hidden fee system in place. A system that has resulted in skyrocketing fees for businesses, higher prices for consumers and record profits for credit card companies and financial institutions.

I strongly urge you to oppose this legislation that would make anticompetitive credit card practices state law and hurt businesses and consumers.