

# EFFECTIVE U.S. INTERCHANGE FEE REGULATION THAT WILL ENSURE CONSUMER WELFARE BASED ON THE EUROPEAN UNION'S IFR

---

Luka Émile Vihuto\*

## *Abstract*

*The single most influential credit card-related fee is widely unregulated in the U.S. The interchange fee, which network providers like Visa and Mastercard set, cost merchants and consumers upwards of \$133.75 billion in 2023. Network providers have worked extremely hard to keep the regulation of these fees at bay while abusing their competitive advantages to charge merchants more year after year while simultaneously restricting their economic freedom of externalizing these costs. In a landmark legislative act, the E.U. chose to regulate these interchange fees for credit cards in 2015 and has since kept close track of how this legislation has affected the credit card market. Through this paper, it will become clear how regulatory reforms in the U.S. based on the 2015 E.U. Regulation are a highly effective way of restoring consumer welfare in the current U.S. credit card market.*

*While most academic publications in the U.S. have singled out specific issues, this paper proposes regulatory solutions that target multiple elements of consumer welfare, specifically meant to ensure pricing transparency and a competitive pricing environment through enabling choice. Merchants will be able to reject payments with certain credit cards*

---

\* Luka Vihuto graduated with a Mag. Iur. from the University of Cologne in 2023, specializing in corporate and commercial law. He earned his LL.M (Business Law) in 2024 from the University of Texas School of Law, and is currently studying in preparation for the New York Bar Exam while working for his mentor. Thanks to my parents for their support and to Hayden Hill, Niklas Häggmark and Philip Hittmeyer for their critical review and comments. Thanks also to the SWJIL editing staff for their great work. This paper was developed as part of the seminar 'Credit Cards in Transition' taught by Prof. Angela K. Littwin at UT Law. Email the author at l.vihuto@gmail.com.

while being able to select alternative processing networks if they accept the card. Finally, at the core, merchants all around the country will be able to surcharge for credit card transactions and thereby give the informed consumer the final say over the means of payment and the costs associated with it.

I. BACKGROUND .....	488
II. INTRODUCTION .....	490
III. CURRENT PROBLEMS OF U.S. INTERCHANGE FEE REGULATION	492
A. Contractual Merchant Restraints.....	492
1. Honor-All-Cards Rules .....	492
2. Blended Merchant Discount Fees.....	493
3. Network Exclusivity Rules.....	494
B. Regulation of Surcharges.....	495
IV. PROPOSED SOLUTIONS BASED ON A REVISED VERSION OF THE	
IFR .....	497
A. The Lacking Impact of Statutory Fee Caps.....	498
B. Regulation of Honor All Products Rules.....	500
C. Mandatory Co-Badging and Enabling Merchant Choice at	
the POS.....	501
D. Anti-Blending Provisions .....	504
E. Unified and Amended Surcharge Rules .....	505
V. CONCLUSION .....	510

I. BACKGROUND

The regulation of interchange fees has long been the subject of intense debates between advocates for consumer protection, regulators,<sup>1</sup> and providers of transaction processing networks (“network providers”).<sup>2</sup>

---

1. See generally Kenley Young, *Is Congress Going to Kill Rewards?*, NERDWALLET (Feb. 23, 2024, 11:26 AM), <https://www.nerdwallet.com/article/credit-cards/is-congress-going-to-kill-credit-card-rewards>; Consumer Fin. Prot. Bureau, *CFPB Report Finds Credit Card Companies Charged Consumers Record-High \$130Billion in Interest and Fees in 2022*, CFPB, (Oct. 25, 2023), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-report-finds-credit-card-companies-charged-consumers-record-high-130-billion-in-interest-and-fees-in-2022/> (arguing that consumers stay in debt while providers profit).

2. See *Excessive Swipe Fees and Barriers to Competition in the Credit and Debit Card Systems: Hearing Before the U.S. S. Judiciary Comm.*, 117th Cong. 6, (2022) (testimony of Ed Mierzwinski, Senior Director, Federal Consumer Programs, U.S. PIRG); Samuel J. Merchant, *Merchant Restraints: Credit Card Transaction Surcharging and Interchange Fee Regulation in the Wake of Landmark Industry Changes*, 68 OKLA. L. REV., 327, 331 (2016); *Credit card fees account for \$3 B in back-to-school costs*, THE GREEN SHEET (July 20,

Interchange fees are meant to compensate for facilitating and processing card transactions and are set by network providers on behalf of banks, consumers, and merchants.<sup>3</sup> In order to facilitate a transaction, the cardholder's bank that issues the card ("issuer") must place a network on their card, while the merchant needs to accept transactions that are routed through this processing network.<sup>4</sup> Network providers typically set different fees for different credit card products, typically higher fees for high-rewards cards and lower fees for low-rewards cards.<sup>5</sup> When a transaction is made, the merchant's bank ("acquirer") will transfer the transaction fee to the issuer, who passes a portion on to the network provider.<sup>6</sup> Acquirers usually compensate for having to pay interchange and other fees by charging the merchants a merchant discount fee ("MDF"). In turn, merchants typically compensate for having to pay the MDF by passing the costs down to consumers in the form of adjusted prices or, in some cases, surcharges.<sup>7</sup> It is important to understand that if enough issuers brand their card with a specific network, merchants will tend to accept the network.<sup>8</sup> This is why network providers compete with issuers by setting high interchange fees, a portion of which issuers keep as revenue.<sup>9</sup>

At its core, the debate surrounding interchange fees is about consumer welfare, with ever-rising "swipe fees" having cost merchants a yearly average of \$135.75 billion in 2023, more than twice as much as in 2019.<sup>10</sup> Because merchants pass transaction costs through, these fees can cost consumers up to \$1000 per household annually.<sup>11</sup> In 2019 Visa and Mastercard processed "83% of all general-purpose credit card transactions in

---

2023), [http://www.greensheet.com/newswire.php?newswire\\_id=57792&search\\_string=swipe%20fees](http://www.greensheet.com/newswire.php?newswire_id=57792&search_string=swipe%20fees).

3. See Merchant, *supra* note 2, at 331-34.

4. See *id.* at 339.

5. See *id.* at 340.

6. See *id.* at 331.

7. *Id.* at 332-33 (describing the fee system on merchants and consumers).

8. Complaint at 6-7, United States v. Visa Inc., 1:21-cv-07214 (S.D.N.Y., Sept. 24, 2024).

9. See Merchant, *supra* note 2, at 339 ("Issuing banks generate revenue directly from cardholders in the form of interest, fee, and other finance changes . . .").

10. Jack Caporal, *Average Credit Card Processing Fees and Costs in 2024*, MOTLEY FOOL MONEY (Dec. 10, 2024), <https://www.fool.com/the-ascent/research/average-credit-card-processing-fees-costs-america/>; see generally Press Release, J. Craig Shearman, Merch. Payments Coal., Merchants Call for Action as Swipe Fees Rise Again (Mar. 21, 2023), <https://merchantspaymentscoalition.com/merchants-call-action-swipe-fees-rise-again>; Press Release, J. Craig Shearman, Nat'l Retail Fed'n, Retailers Say Delay of Visa/Mastercard Swipe Fee Increase Should be Made Permanent (Mar. 16, 2021), <https://www.marketscreener.com/news/latest/Retailers-Say-Delay-of-Visa-Mastercard-Swipe-Fee-Increase-Should-be-Made-Permanent-32708339/>.

11. Nat'l Retail Fed'n, *Swipe Fees*, NRF, <https://nrf.com/advocacy/policy-issues/swipe-fees> (last visited Jan. 1, 2025).

the U.S.” and are by far the largest network providers.<sup>12</sup> They claim interchange fees are simply the cost of doing business and benefit merchants by increasing the number of customers, revenue, and guaranteeing payment services.<sup>13</sup> According to providers, consumers benefit because the revenue from the interchange fees funds credit, rewards programs, and fraud prevention and detection services.<sup>14</sup> In reality, merchants and consumers hardly hold any bargaining power, while network providers and issuers are left to inflate their profits and market shares.<sup>15</sup> With the cost of credit at an all-time high<sup>16</sup> and the total volume of U.S. credit card transactions forecast to reach 74,962.8 in 2028, the acute need for effective regulation is evident.<sup>17</sup>

## II. INTRODUCTION

Current U.S. federal regulation of interchange fees is ineffective at ensuring consumer welfare. Instead, it creates and perpetuates an anticompetitive price-setting environment that allows network providers to inflate profits through imposing contractual restraints on merchants.<sup>18</sup> Such restraints include “honor-all-card” rules that obligate merchants to accept high-fee credit cards and “network exclusivity rules” that require merchants to process transactions exclusively via one network and hinder new network providers from entering the market.<sup>19</sup> There are also rules that allow network providers to charge so-called ‘blended’ MDFs that misconstrue the true cost of interchange fees.<sup>20</sup> In addition, a lack of unified rules allowing merchants

---

12. BD. OF GOVERNORS FED. RESRV. SYS., REPORT TO THE CONGRESS ON THE PROFITABILITY OF CREDIT CARD OPERATIONS OF DEPOSITORY INSTITUTIONS 7 (2020) (referencing HSN Consultants, Inc., *The Nilson Report Issue 1169*, NILSON REPORT (Feb. 2020), <https://nilsonreport.com/newsletters/1169/>).

13. See Edward Wyatt, *Retailers Push Fed for Yet Lower Debit Fees*, N.Y. TIMES (Nov. 23, 2011), <https://www.nytimes.com/2011/11/24/business/retailers-push-for-yet-lower-debit-fees.html>.

14. *Id.*

15. European Economic and Social Committee 2013 O.J. (C 170/78) ¶ 1.2 [hereinafter O.J.]; Press Release, Off. of Pub. Aff., Justice Department Sues American Express, Mastercard and Visa to Eliminate Rules Restricting Price Competition (Oct. 4, 2010), <https://www.justice.gov/opa/pr/justice-department-sues-american-express-mastercard-and-visa-eliminate-rules-restricting>.

16. See CONSUMER FIN. PROT. BUREAU, THE CONSUMER CREDIT CARD MARKET 49-50 (2023).

17. MARKETLINE INDUSTRY PROFILE, CREDIT CARDS IN THE UNITED STATES 14 (2024), <https://advantage.marketline.com/Analysis/ViewasPDF/united-states-credit-cards-152299>.

18. See Merchant, *supra* note 2, at 330-31.

19. See *id.* at 342, 344.

20. See *id.* at 335.

to surcharge for credit card transactions curtail fee transparency, consumer choice, and, thereby, bargaining power.

In 2010, Congress regulated interchange fees for debit card transactions via the Durbin Amendment to the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”).<sup>21</sup> Analysis of the Durbin Amendment, but more importantly, analysis of E.U. Regulation 2015/751 (“Interchange Fee Regulation” or “IFR”) and its effects will ensure that regulatory amendments result in more competitive price-setting and ultimately benefit consumer welfare in the U.S. market.<sup>22</sup> The IFR includes several rules that aim to regulate the contractual restraints imposed on merchants. Firstly, it regulates “honor-all-cards” rules.<sup>23</sup> Adopting similar regulations will strengthen merchants’ ability to exert pressure on pricing practices.<sup>24</sup> Further, the IFR mandates issuers to enable the processing of credit card transactions through unaffiliated networks (“co-badging”) and gives merchants the right to select a network at the point of sale.<sup>25</sup> Adopting rules to similar effect will further strengthen merchant bargaining positions. Lastly, the IFR requires networks to charge merchants an unblended MDF,<sup>26</sup> adoption of which will lead to more transparent pricing and ensure not only that merchants and consumers can make informed choices but also that merchants pass any savings through to consumers.

Every regulatory solution proposed in this article is based on IFR regulation. They have been amended based on observed shortcomings of both the IFR and similar regulations set forth in the Durbin Amendment. Reforms would lead to competitive pricing and improved welfare by strengthening the value of consumer and merchant choice of processing network and by lowering the barrier of entry for new network providers.

---

21. See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 2068 (2010).

22. See Regulation (EU) 2015/751 of the European Parliament and of the Council of 29 April 2015 on Interchange Fees for Card-Based Payment Transactions, 2015 O.J. (L 123/1) ¶ 37 [hereinafter Regulation (EU) 2015/751].

23. See *id.* at art. 10.

24. See *id.*

25. See *id.* at art. 8.

26. See *id.* at art. 9, 12.

### III. CURRENT PROBLEMS OF U.S. INTERCHANGE FEE REGULATION

#### A. Contractual Merchant Restraints

##### 1. Honor-All-Cards Rules

Honor-all-cards (“HAC”) rules hold that if a merchant accepts *any* credit card product from a network provider, it must accept *all* credit card products from this network provider.<sup>27</sup> This keeps merchants from leveraging their market power which lies in accepting or denying the transaction fees associated with a particular card product; thus, HAC rules hinder competitive interchange fee pricing. In other words, if a market for high-fee cards is guaranteed because merchants are forced to accept them, network providers have no reason to lower their transaction processing fees.

Network providers include HAC rules in their merchant rules.<sup>28</sup> They typically entail two dimensions.<sup>29</sup> First, an obligation of the merchant to accept a credit card branded by a particular network provider regardless of issuer (“honor-all-issuers”), meaning if a merchant accepts a Visa-branded card issued by Chase, it must accept a Visa-branded card issued by the Bank of America.<sup>30</sup> Secondly, HAC rules can obligate merchants to accept all products offered under the network provider’s brand (“honor-all-products”). In the case of Visa, if a merchant accepts any Visa credit card product, for example, the low-reward “Traditional Rewards” card, it must also accept all other Visa credit cards (“Visa Infinite Spend Qualified,” “Visa Infinite Spend Not Qualified,” “Visa Signature Preferred,” “Visa Signature”).<sup>31</sup> Importantly, in an all-or-nothing fashion,<sup>32</sup> if merchants accept credit cards with lower interchange fees, typically non- or low-reward cards, they must accept high-reward cards with higher interchange fees.<sup>33</sup> In the case of Visa,

---

27. See Merchant, *supra* note 2, at 344.

28. See VISA, VISA CORE RULES AND VISA PRODUCT AND SERVICE RULES 110 (2024), <https://usa.visa.com/content/dam/VCOM/download/about-visa/visa-rules-public.pdf>; see also MASTERCARD, MASTERCARD RULES 325 (2025), <https://www.mastercard.us/content/dam/public/mastercardcom/na/global-site/documents/mastercard-rules.pdf>.

29. See RESERVE BANK OF AUSTRALIA, REFORM OF THE EFTPOS AND VISA DEBIT SYSTEMS IN AUSTRALIA 40 (2005), <https://www.rba.gov.au/payments-and-infrastructure/debit-cards/consult-doc-feb05/pdf/consult-doc-feb05.pdf> (listing the “honor all issuers rule” and “honor all products rule”); see also Regulation (EU) 2015/751 at para. 37.

30. See RESERVE BANK OF AUSTRALIA, *supra* note 29, at 40.

31. VISA, VISA USA INTERCHANGE REIMBURSEMENT FEES, CONSUMER CREDIT INTERCHANGE REIMBURSEMENT FEES 7 (2024), <https://usa.visa.com/content/dam/VCOM/download/merchants/visa-usa-interchange-reimbursement-fees.pdf>.

32. Adam J. Levitin, *Priceless? The Social Costs of Credit Card Merchant Restraints*, 45 HARV. J. LEGIS. 12 (2008).

33. *Id.*

the current interchange fee for a “Visa Infinite Spend Qualified” transaction at a restaurant can be up to 2.60% of the total amount charged<sup>34</sup> while the interchange fee for a Visa “Traditional Rewards” card transaction will only be 2.20% of the amount charged,<sup>35</sup> a significant difference over a given number of transactions. In unison with the lack of a statutory fee cap, HAC rules mean that network providers can freely set interchange fees for high-fee cards and ensure that merchants will accept them.<sup>36</sup> Contrary to claims by network providers, HAC rules restrain trade and merchants gain no advantage by accepting these high fee cards.<sup>37</sup> The cardholders of high-fee, high-reward cards usually have the purchasing power for products they purchase with their credit card,<sup>38</sup> meaning they would likely have made the purchase regardless of whether the merchant accepts their credit card or not. HAC rules, therefore, serve no purpose to consumers or merchants.

## 2. Blended Merchant Discount Fees

MDFs, as defined in the introduction, are charged from acquirer to merchant and typically comprise three fees: the interchange fee, which the acquirer pays to the issuer, the network fee, which the acquirer pays to the network provider, and the processing fee, which the acquirer keeps.<sup>39</sup> Acquirers can pursue different models when charging merchants MDFs. Large merchants are typically charged under the “interchange plus plus” model, which assesses all three fees individually.<sup>40</sup> Large merchants prefer

---

34. VISA, *supra* note 31, at 8.

35. *Id.* at 9.

36. Defendant’s Memorandum in Support of Final Approval of Definitive Class Settlement Agreement at 10, *In re* Payment Card Interchange Fee and Merch. Disc. Antitrust Litig., E.D.N.Y.R (2013), (1:05-md-01720-JG-JO, Document 2110), <https://paymentcardsettlement.com/Content/Documents/Defendants%20Memorandum%20in%20Support%20of%20Final%20Approval.pdf>.

37. Levitin, *supra* note 32, at 16; *see also* Wyatt, *supra* note 13; *see generally* *Overview of Interchange and its Value*, ELECTRONIC PAYMENTS COALITION (June 16, 2021), <https://electronicpaymentscoalition.org/resources/overview-of-interchange-and-its-value/>.

38. *See* CONSUMER FIN. PROT. BUREAU, *supra* note 16, at 88.

39. Fumiko Hayashi, *The New Debit Card Regulations: Effects on Merchants, Consumers, and Payments System Efficiency*, 98 ECON. REV. FED. RSRV. BANK KAN. CITY J. 89, 97 (2013), [https://www.kansascityfed.org/Economic%20Review/Economic%20Review/documents/1625/The\\_New\\_Debit\\_Card\\_Regulations\\_Effects\\_on\\_Merchants\\_Consumers\\_and\\_Payments\\_System\\_Efficiency.pdf](https://www.kansascityfed.org/Economic%20Review/Economic%20Review/documents/1625/The_New_Debit_Card_Regulations_Effects_on_Merchants_Consumers_and_Payments_System_Efficiency.pdf).

40. Kathleen A. McConnell, *The Durbin Amendment’s Interchange Fee and Network Non-Exclusivity Provisions: Did the Federal Reserve Board Overstep Its Boundaries*, 18 N.C. BANKING INST. 627, 634 (2014), <https://scholarship.law.unc.edu/ncbi/vol18/iss2/16/> (first citing Fumiko Hayashi, *The New Debit Card Regulations: Effects on Merchants, Consumers, and Payments System Efficiency*, 98 ECON. REV. FED. RSRV. BANK KAN. CITY J. 89, 97 (2013); then citing David S. Evans et al., *Economic Analysis of Claims in Support of the “Durbin Amendment” to Regulate*

individual pricing because it is more transparent and directly reflects an often individually negotiated interchange fee. In contrast, smaller merchants typically choose to be charged a ‘blended’ rate, which either entails a flat fee, a percentage of the transaction value, or a percentage of the total transaction value over a given period.<sup>41</sup> This model is popular because it allows for easier budgeting<sup>42</sup> and because the flat fee is charged irrespective of card type and brand.<sup>43</sup> However, being charged a blended fee has multiple drawbacks.

First, when the acquirer charges a blended fee, changes in interchange fees are not reflected in the blended rate until it is recalculated in its entirety.<sup>44</sup> If fees are determined by total transaction value over a given period, this might only be quarterly, semiannually, or even annually. Second, a blended fee is much less transparent because merchants cannot individually assess the interchange fees charged by card type, brand, or transaction value.<sup>45</sup> If the merchant is charged a flat fee this could result in them paying more than the applicable interchange rate for a single transaction.<sup>46</sup> Finally, a blended fee allows acquirers to make up for losses in interchange revenue by adjusting other fees and keeping the blended rate near its previous level. This hinders the pass-through of any reduced interchange fee. While blended fees might be preferable to some merchants due to their administrative ease, the fact that they make fees less transparent and are frequently exploited by acquirers means they pose an issue for effective regulation of interchange fees with the goal of competitive pricing.

### 3. Network Exclusivity Rules

There are no regulations that hinder network providers from including clauses in their agreements that tie merchants or acquirers exclusively to one network. In a few cases, these ‘exclusivity clauses’ might be part of a negotiated agreement with large merchants to offer lower interchange fees,<sup>47</sup> but by and large, such clauses are detrimental for merchants because they

---

*Debit Card Interchange Fees* 2 n.5 (Visa, Inc., Working Paper 1843628, 2011) (2009); and then citing *Debit Card Interchange Fees and Routing*, 76 Fed. Reg. at 43,396 n.17).

41. *Id.* (first citing *Debit Card Interchange Fees and Routing*, 76 Fed. Reg. at 43,396 n.17; and then citing Fumiko Hayashi, *The New Debit Card Regulations: Effects on Merchants, Consumers, and Payments System Efficiency*, 98 ECON. REV. FED. RES. BANK KAN. CITY J. 89, 97 (2013)).

42. Hayashi, *supra* note 39, at 97.

43. *Id.* (listing lack of resources as the reason it is preferred by smaller merchants).

44. *See id.* at 98.

45. *See id.* at 97 (stating that larger merchants prefer the interchange plus fee structure).

46. McConnell, *supra* note 40, at 634-35.

47. David Chang, *Will Costco Ever Accept Another Type of Credit Card?*, THE GLOBE AND MAIL (Mar. 10, 2023), <https://www.theglobeandmail.com/investing/markets/stocks/V-N/pressreleases/14963667/will-costco-ever-accept-another-type-of-credit-card/>.



give networks an incentive to set their interchange fees higher than their competitors to attract more issuers.<sup>48</sup> In other words, once the merchant is tied to a processing network through an exclusivity clause, network providers can drive interchange fees up and market themselves to issuers, who keep a portion of the interchange fee as revenue. This substantially restricts competition for issuers amongst network providers<sup>49</sup> by allowing “dominant networks . . . to raise their network fees . . . without concern for lost transaction volume because merchants have no alternatives for routing transactions.”<sup>50</sup> A consequence of tying merchants to one network provider is that new or smaller network providers are prevented from competing for merchants and for issuers because they can neither offer interchange fees as high as large networks, nor access merchants that are tied to dominant processing networks through exclusivity clauses. In order to achieve competitive pricing, exclusivity clauses must be banned.

### *B. Regulation of Surcharges*

Adding to these contractual restraints, unclear and fractionated surcharge provisions mean that most merchants are left to externalize the excessive costs of transaction processing by raising product prices. Current surcharge rules are the cause of three main issues: (1) regressive cross-subsidization, (2) unfair competitive advantages of large merchants over small ones, and (3) confusion and administrative difficulty that can deter merchants from imposing surcharges in the first place.<sup>51</sup>

Generally, U.S. federal law allows merchants to surcharge if they give network providers 30 days’ notice of their intention to do so and disclose the surcharge to the consumer at the point of sale (“POS”) and on the receipt. However, because the federal surcharge statute is not protected many states

---

48. Hayashi, *supra* note 39, at 98; *see also* United States v. Visa USA, Inc. 163 F. Supp. 2d 322, 333 (S.D.N.Y. 2001).

49. U.S. GOV’T ACCOUNTABILITY OFF., CREDIT AND DEBIT CARDS: FEDERAL ENTITIES ARE TAKING ACTIONS TO LIMIT THEIR INTERCHANGE FEES, BUT ADDITIONAL REVENUE COLLECTION COST SAVINGS MAY EXIST, at 56 app. II, (2008), <https://www.gao.gov/assets/gao-08-558.pdf>.

50. NACS v. Bd. of Governors of Fed. Rsrv. Sys., 958 F. Supp. 2d 85, 90 (D.D.C. 2013), *rev’d*, 746 F.3d 474 (D.C. Cir. 2014).

51. *See Is It Legal to Surcharge On Credit Cards? Your Guide To 2022 Surcharge Laws*, NAT’L MERCH. ASS’N, <https://www.nationalmerchants.com/is-it-legal-to-surcharge-on-credit-cards-your-guide-to-2022-surcharge-laws/> (last visited Feb. 12, 2025).

have differing regulations.<sup>52</sup> In Connecticut,<sup>53</sup> Maine,<sup>54</sup> and Massachusetts<sup>55</sup> no-surcharge statutes are currently in effect. No-surcharge statutes have been in effect in Colorado,<sup>56</sup> New York,<sup>57</sup> California,<sup>58</sup> and Texas,<sup>59</sup> but repeals have happened and are pending. The no-surcharge statutes have been declared unconstitutional by federal courts of appeals in Florida.<sup>60</sup>

Regressive cross-subsidization mostly occurs in states with no-surcharge statutes or states with non-mandatory surcharge statutes. In short, regressive cross-subsidization means that cardholders with lower credit scores pay in part for the rewards of cardholders with higher credit scores. This phenomenon happens because interchange fees make up the second-highest source of income for issuers,<sup>61</sup> and substantially fund rewards.<sup>62</sup> Therefore, network providers will charge higher interchange fees for processing transactions of high-reward cards. Since non-reward card users, cash users, or low-reward card users buy products that merchants are forced to mark up, they essentially pay for part of the interchange fees that fund the rewards of high-reward card consumers.<sup>63</sup> Because cardholders of high-reward cards usually have higher credit scores, and cardholders of lower or no-reward cards usually have lower credit scores, this system is regressive.<sup>64</sup> This can still occur in states where surcharging is permitted but not required, since in these states, small merchants tend to surcharge less due to competitive risks (alienating customers due to demanding a surcharge).<sup>65</sup> Aside from leading to cross subsidization, non-mandatory surcharge states

---

52. Merchant, *supra* note 2, at 353; Matt Rej, *Credit Card Surcharge Laws by State (Updated for 2025)*, MERCHANT COST CONSULTING, (Dec. 24, 2024), <https://merchantcostconsulting.com/lower-credit-card-processing-fees/credit-card-surcharge-laws-by-state/>.

53. CONN. GEN. STAT. § 42-133ff (2024).

54. ME. REV. STAT. ANN. TIT. 9-a, § 8-509 (West 2024).

55. H.D. 260, 193 Gen. Ct. (Ma. 2023).

56. S.B. 21-091, 73rd Gen. Assemb., (Co. 2021).

57. *Expressions Hair Design v. Schneidermann*, 808 F.3d 118, 118 (2nd Cir. 2015); A.B. 314, 244th Leg. Sess. (N.Y. 2021); *see also* Levitin, *supra* note 32, at 56-57.

58. *See Italian Colors Rest. v. Becerra*, 878 F.3d 1165, 1168 (9th Cir. 2018) (stating California “prohibits” imposing surcharges.”).

59. *Rowell v. Pettijohn*, 816 F.3d 73, 76 (5th Cir. 2016).

60. *See Dana’s R.R. Supply v. Att’y Gen.*, 807 F.3d 1235, 1239 (11th Cir. 2015) (explaining how the law is unconstitutional “. . . by discriminating on the basis of the speech’s content . . .”).

61. *See* CONSUMER FIN. PROT. BUREAU, *supra* note 16, at 22, 24-25.

62. *Id.* at 98-99.

63. Emily Stewart, *The ugly truth behind your fancy rewards credit card*, VOX (June 3, 2021), <https://www.vox.com/the-goods/22454885/who-pays-for-credit-card-rewards>.

64. *See* CONSUMER FIN. PROT. BUREAU, *supra* note 16, at 99; *see also* Levitin, *supra* note 32, at 3.

65. Stewart, *supra* note 63.

favor big merchants (e.g., Costco) that carry enough transaction volume to negotiate lower interchange fees that they can absorb without needing to raise product prices.<sup>66</sup>

Lastly, fractionated and complex regulations mean merchants must invest considerable resources in determining whether they can surcharge, what amount on what card transaction, and how they must disclose such surcharges to consumers.<sup>67</sup> In addition to the constantly changing state rules<sup>68</sup> and federal rules, network providers can also set their own contractual rules. Both Visa's and Mastercard's merchant rules include provisions according to which a surcharge must not exceed the MDF and never exceed 3.00% (Visa)<sup>69</sup> and 4.00% (Mastercard)<sup>70</sup> of the transacted amount. Surcharging under current regulation is a cost and time-intensive undertaking for many small merchants, only to be confronted with potential competitive disadvantages.

#### IV. PROPOSED SOLUTIONS BASED ON A REVISED VERSION OF THE IFR

Regulatory reform is the most effective way of subjecting interchange fee pricing to competitive market pressures. Such reforms could empower the merchant's bargaining position and confront consumers with the actual cost of credit card payments. Not only would merchants and consumers benefit from interchange fee prices that would most likely be lower than now, but the regulations in the following section will enable them to make active choices and provide them with options regarding which interchange fees they deem acceptable and which they do not. Moreover, the high likelihood of lower interchange fees would mean the U.S. market would finally be on eye level with other jurisdictions that have regulated credit card interchange fees.

---

66. *See id.*

67. *Visa Reduces Its Merchant Surcharge Cap to 3% Effective April 15, 2023: Merchants Should Ensure They Are in Compliance to Avoid Fines, Fees, and Litigation*, ARENT FOX SCHIFF (July 24, 2023), <https://www.afslaw.com/perspectives/alerts/visa-reduces-its-merchant-surcharge-cap-3-effective-april-15-2023-merchants> [hereinafter Fox Schiff].

68. *See Expressions Hair Design v. Schneiderman*, 137 S.Ct. 1444, 1147 (2017) (remanding to determine whether no-surcharge provisions regulate free speech in New York).

69. Fox Schiff, *supra* note 67; *see also* Visa, *Merchant Surcharging Considerations and Requirements*, <https://usa.visa.com/content/dam/VCOM/global/support-legal/documents/merchant-surcharging-considerations-and-requirements.pdf> (last visited Feb. 10, 2025).

70. *Merchant Surcharge FAQ*, MASTERCARD, [https://www.mastercard.us/content/dam/public/mastercardcom/na/us/en/documents/Merchant\\_Surcharge\\_FAQ.pdf](https://www.mastercard.us/content/dam/public/mastercardcom/na/us/en/documents/Merchant_Surcharge_FAQ.pdf) (last visited Feb. 10, 2025).

In direct comparison, credit card interchange fees in the U.S. average 1.76%, while they average around 0.96% in the E.U.<sup>71</sup>

*A. The Lacking Impact of Statutory Fee Caps*

The simplest way of keeping interchange fees at bay would be a statutory fee cap. IFR Article 4 introduces fee caps on all consumer credit card products of “no more than 0.3% of the value of the transaction” to prevent network providers from competing with issuers by offering them high interchange fees to the detriment of merchants and consumers.<sup>72</sup> Similarly, Title X of the Durbin Amendment to the Dodd-Frank Act set a statutory fee cap for debit card interchange fees in the U.S. of 21 cents.<sup>73</sup>

In reality, a statutory fee cap is inefficient for consumer welfare purposes for multiple reasons. Primarily because it does not further a more competitive price-setting environment amongst issuers by itself. Big issuers have a potential competitive advantage over smaller issuers like credit unions or consumer banks because they are more likely able to absorb any loss of interchange revenue due to economies of scale.<sup>74</sup> Regarding debit card interchange fees, the U.S., Congress effectively prevented this by excluding issuers with less than \$10 billion in assets from the statutory fee cap, meaning small issuers could continue charging higher interchange fees.<sup>75</sup> Initially, the excluded issuers were concerned about the possibility of being subjected to pressures by merchants to lower interchange fees and having to compensate for this loss of interchange revenue by charging their clients higher banking fees than big issuers.<sup>76</sup> However, within the first year, the total<sup>77</sup> interchange income made by issuers, that were subject to the fee cap, dropped by 34% compared to only a drop of 2% for issuers that were excluded from the fee

---

71. See Joe Resendiz, *The Cost of Accepting Credit Card Payments: NA vs. EU*, LENDINGTREE (Aug. 16, 2023), <https://www.lendingtree.com/credit-cards/articles/na-vs-eu-interchangefees/>.

72. See EUR. COMM'N, STUDY ON THE APPLICATION OF THE INTERCHANGE FEE REGULATION: FINAL REPORT 83 (2020) [hereinafter IFR STUDY] (assessing the impact of the interchange fee regulations on merchants, issuers, and consumers only for credit cards operated in an open-loop system).

73. Jessie Cheng, *The Fed Proposes a Sea Change in Debit Card Interchange Fee Regulation*, AMERICAN BAR ASSOCIATION (Nov. 2023), [https://www.americanbar.org/groups/business\\_law/resources/business-law-today/2023-november/fed-proposes-sea-change-debit-card-interchange-fee-regulation/](https://www.americanbar.org/groups/business_law/resources/business-law-today/2023-november/fed-proposes-sea-change-debit-card-interchange-fee-regulation/).

74. See Press Release, Michelle W. Bowman, Bd. of Governors of the Fed. Rsrv. Sys., Statement on Proposed Revisions to Regulation II's Interchange Fee Cap (Oct. 25, 2023), <https://www.federalreserve.gov/newsevents/pressreleases/bowman-statement-20231025.htm>.

75. *Id.*

76. See Nicholas Georgiton, *The Dodd-Frank Act: What Community Bankers Need to Know*, 128 BANKING L. J., 6 (2011).

77. “Total” meaning both for credit card and debit card transactions.

cap.<sup>78</sup> This meant smaller issuers could stay competitive by maintaining low banking fees and could continue offering their clients services and benefits such as free checking accounts and rewards programs, which larger issuers had to scrap as a result of the reduced interchange income.<sup>79</sup> In theory, a similar solution could be employed for a credit card interchange fee cap. While this would mitigate competitive disadvantages for small issuers, it will not do the same for network providers and will therefore not meaningfully benefit merchants and consumers.

Network providers rely on issuers branding their cards with their networks and on merchants accepting cards and routing transactions through this network.<sup>80</sup> Issuers are more likely to brand their cards with a network if the interchange fees are higher, while merchants are more likely to accept and route transactions through a network if the interchange fees are lower. In practice, network providers must balance these fees to be profitable. With a statutory fee cap in place, it would be impossible for new or small network providers to compete for issuers on interchange fees. Further, it would be unprofitable to compete for merchants on interchange fees lower than the fee cap because a fee cap should come as close as possible to the true cost of the service provided and not allow for a profit margin to be undercut. While new or small network providers are currently unable to compete due to HAP rules and exclusivity agreements, introducing a statutory fee cap would dampen the results of any regulatory reforms that targets such contractual restraints and enables competitive price-setting.

Additionally, an asset threshold does not address the fact that statutory fee caps could potentially hurt small merchants and consumers. Before the Dodd-Frank Act came into effect, some network providers charged lower interchange fees for small transactions or transactions at small businesses, which they could cross-subsidize by overcharging for other transactions.<sup>81</sup> Currently, Visa offers reduced credit card interchange rates for small merchants, presumably financed in a similar manner.<sup>82</sup> This changed after the

---

78. Zhu Wang, *Debit Interchange Fee Regulation: Some Assessments and Considerations*, 98 ECON. Q. 159, 167 (2012), [https://www.richmondfed.org/-/media/richmondfedorg/publications/research/economic\\_quarterly/2012/q3/pdf/wang.pdf](https://www.richmondfed.org/-/media/richmondfedorg/publications/research/economic_quarterly/2012/q3/pdf/wang.pdf).

79. McConnell, *supra* note 40, at 654; *see also* Dakin Campbell, *Wells Fargo Cancels Pilot Program of \$3 Monthly Debit-Card Fee*, BLOOMBERG (Oct. 28, 2011), <https://www.bloomberg.com/news/articles/2011-10-28/wells-fargo-cancels-pilot-program-of-3-debit-card-fee-as-customers-react>.

80. Hayashi, *supra* note 39, at 88.

81. *See* Renee Haltom & Zhu Wang, *Did the Durbin Amendment Reduce Merchant Costs? Evidence from Survey Results*, FED. RSRV. BANK RICH. 2 (Dec. 2015), [https://www.richmondfed.org/-/media/richmondfedorg/publications/research/economic\\_brief/2015/pdf/eb\\_15-12.pdf](https://www.richmondfed.org/-/media/richmondfedorg/publications/research/economic_brief/2015/pdf/eb_15-12.pdf).

82. *See* Hayashi, *supra* note 39, at 96-97.

introduction of the interchange fee cap for debit cards, which forced the large network providers to raise all interchange fees up to the cap.<sup>83</sup> For merchants that had previously benefited from lowered fees, this meant that the introduction of the fee cap actually had the adverse effect of higher interchange fee payments. This unintended consequence of the Durbin Amendment forced some merchants to relay these increased costs to consumers by raising product prices.<sup>84</sup> Additionally, issuers suffering losses from lower interchange revenue responded by scrapping free basic checking accounts and increasing monthly account fees,<sup>85</sup> which was detrimental for consumers who relied on such services.

Finally, determining which expenses to include in a statutory fee cap is extremely complicated and requires considerable effort to set and adjust as the market and technologies of payment systems advance. Experience with the debit card interchange fee shows that choices to include and exclude certain factors in the determination process are very controversial and have gone as far as to cause efforts to be litigated by merchant groups, like in the case of the Federal Reserve's decisions on debit interchange.<sup>86</sup> Many of these "nasty complexities associated with rate-making procedures"<sup>87</sup> that make regulation inefficient and ineffective could be avoided by opting not to cap credit card interchange fees.

Because of its deficits regarding competition among network providers and the detrimental effect observed for merchants and consumers when introduced to debit card interchange fees, this proposal argues that statutory fee caps are ineffective for enhancing competition and consumer welfare.

### *B. Regulation of Honor All Products Rules*

Enabling merchants to leverage their market power against network providers effectively is integral to achieving lower interchange fees. One way this can be done is by banning HAP provisions and thereby allowing them to discriminate against high-fee credit cards associated with a network of which they accept other credit cards. E.U. legislators hold that HAP rules are a

---

83. See Kaitlyn E. Evans, *A Call for Change in Interchange Fee Regulation: Examining the Durbin Amendment Disaster Through the Lens of NACS v. Federal Reserve Board*, 9 LIBERTY UNIV. L. REV. 559, 565-66 (2015); see also McConnell, *supra* note 40, at 656.

84. Wang, *supra* note 78, at 170.

85. See *id.* at 171 ("[m]ajor banks include[ed] Bank of America, Wells Fargo, and Chase. . .").

86. Evans, *supra* note 83, at 560 (referencing Nat'l Ass'n of Convenience Stores v. Bd. of Governors of the Fed. Reserve Sys., 746 F.3d 474, 481 (D.C. Cir. 2014)).

87. Richard A. Epstein, *The Regulation of Interchange Fees: Australian Fine-Tuning Gone Awry*, 3 COLUM. BUS. L. REV. 551, 586 (2005).

“tying practice” and have decided to ban such provisions with the IFR<sup>88</sup> apart from certain exceptions.<sup>89</sup>

Network providers argue that HAP rules provide consumers with the certainty that merchants will accept their credit card and, therefore, the certainty of being able to make the desired purchase.<sup>90</sup> This argument only stands in part because the cards merchants would most likely no longer accept are high-fee cards typically held by consumers who are likely to have a high credit score and do not rely on this particular card as a sole means of payment.<sup>91</sup> In fact, the main factor driving cardholders to pay with high-fee cards over other cards or other means of payment is, in most cases, the premium rewards associated with the usage of the high-fee card.<sup>92</sup> Of course, the cardholder would be denied the convenience of paying with this card and receiving said rewards but will typically still be able to make the purchase through other means.<sup>93</sup> Further, ensuring card acceptance by merchants should not be an issue of legislation but rather of competitive free market principles. Because networks rely on merchants to accept their cards, allowing merchants to refuse high-fee cards would force networks to avoid non-acceptance by pricing interchange fees for all their products similarly. Discrimination against high-fee cards would mainly hurt network providers and issuers due to the likely loss in interchange revenue, but not the cardholders of high-fee cards or merchants.

Considering all this, it is important to recognize that effective surcharging would make aban on HAP rules much less important. Through surcharging, the cost of accepting a high-fee credit card would lie with consumers, not with merchants, and the financial motivation of the latter to deny high-fee cards would likely be outweighed by the motivation to access as broad a customer base as possible.

### C. *Mandatory Co-Badging and Enabling Merchant Choice at the POS*

Another effective way of removing existing barriers to a competitive pricing environment would be a regulation that mandates issuers to associate a credit card with two or more unaffiliated network providers and allows its transactions to be processed through either (“co-badging”) while enabling merchants to select which network they would prefer to use at the POS.

---

88. Regulation (EU) 2015/751 ¶ 37.

89. *Id.* at art. 10 ¶ 2.

90. *Id.* at ¶ 37.

91. CONSUMER FIN. PROT. BUREAU, *supra* note 16, at 88-89 figs. 17 & 18..

92. Levitin, *supra* note 32, at 27.

93. *See id.* at 24.

IFR Article 8 and the Durbin Amendment include routing provisions, which mandate issuers to enable transaction routing through at least two unaffiliated networks and enable merchants to select which of these networks to use.<sup>94</sup> Although, in the case of the Durbin Amendment, the regulations did not extend to all debit card transactions,<sup>95</sup> they have shown a significant impact on the ability of merchants to exert pressure and effectuate lower interchange fees. The example of Interlink<sup>96</sup> stands out in particular. Interlink was a major PIN debit transaction processing network operated by Visa. After the Dodd-Frank Act went into effect, Interlink's market share plummeted due to merchants opting to process the transactions through cheaper networks.<sup>97</sup> Naturally, in order for this to work, multiple network providers must be available. This is the case in the E.U. because credit cards will typically be associated with a domestic and an international network, allowing the processing of domestic transactions via either one of the networks and its international transactions exclusively through the international network.<sup>98</sup> This practice allows card usage across different E.U. member states.<sup>99</sup> Before the IFR came into effect, domestic network providers were able to compete with international networks because issuers would co-badge their cards to provide as much service to their clients as possible.<sup>100</sup> International networks naturally wanted access to the domestic processing market and forbidding issuers from co-badging in their issuer rules, a practice quickly recognized and prohibited by IFR Article 8 (1-4).<sup>101</sup> In the U.S. issuers have no existing practice of co-badging and no need to do so because the same networks process national and domestic transactions. Still, co-badging would most likely impact credit card interchange fees substantially since new network providers would not be blacklisted through issuer or network rules and would subject interchange fees of existing networks to competitive pricing.<sup>102</sup>

---

94. Wang, *supra* note 78, at 165; Evans, *supra* note 83, at 569; see 15 U.S.C. § 1693o-2(b)(1)(A).

95. See *NACS v. Bd. of Governors of Fed. Reserve Sys.*, 958 F. Supp. 2d 85, 110 (2013) (mandating co-badging on cards so there was no longer the requirement of two networks per card).

96. Hayashi, *supra* note 39, at 98.

97. See *id.*

98. See IFR STUDY, *supra* note 72, at 190 (“[C]o-badgered cards typically carry a domestic card brand and an international card brand allowing the cardholder to use the same card for both domestic . . . and cross-border card payment transactions. . .”).

99. See *id.* at 190, 191.

100. See *id.*

101. Regulation (EU) 2015/751 art. 8 ¶¶ 1-4.

102. Merchs. Payments Coal., *Credit Card Routing Matters: Support the Credit Card Competition Act*, S. 1838/H.R. 3881, [https://merchantspaymentscoalition.com/sites/default/files/2024-04/CreditCardRoutingMatters-2024-04-29\\_0.pdf](https://merchantspaymentscoalition.com/sites/default/files/2024-04/CreditCardRoutingMatters-2024-04-29_0.pdf) (last visited Feb. 23, 2025).



When analyzing the application and effects of IFR Article 8, legislators need to make two amendments to ensure effectivity in the U.S.

First, U.S. regulation must make it obligatory for issuers to co-badge and issue these co-badged credit cards to cardholders. The IFR gives issuers the choice of whether or not to co-badge their cards. While co-badging was already common in member states with domestic processing networks before the IFR went into effect, the share of issuers that chose to co-badge only after the IFR went into effect (meaning they did not offer co-badged cards before) increased by only 2%.<sup>103</sup> In the case of France, the percentage of co-badged credit cards remained constant at around 75% between 2015 and 2017.<sup>104</sup> While this lack in increase is in part attributable to the market being saturated, meaning there was simply no demand or financial benefit to co-badging even more cards than they already were,<sup>105</sup> the choice of E.U. legislators to not require issuers to co-badge under the IFR also played a significant role.<sup>106</sup> Additionally, under the IFR, consumers only receive a co-badged card if they demand one from their issuer.<sup>107</sup> Since the IFR entails no duty for issuers to inform consumers of the option to co-badge, consumers need to be sufficiently motivated and educated to find out whether their issuer offers a co-badged card and demand one.<sup>108</sup> In the U.S., this ‘opt-in’ system of co-badging would be even less effective than it has shown to be in the E.U. since co-badging is not already common practice here. It is safe to assume that if given the option, U.S. issuers would most likely lack financial motivation to change workflow, technology, and accounting practices to accommodate for co-badging while having to educate consumers on the option to do so while consumers in the U.S. would lack the motivation to gain knowledge or become sophisticated enough to demand a co-branded card from their issuer. Even though every household in the U.S. is estimated to pay an average of \$1000 per year in interchange fees,<sup>109</sup> these fees are usually passed on via markups.<sup>110</sup> They are not transparent enough to enable consumers to discern how much interchange fee was paid on a given transaction and what these fees amount to, while there is no guarantee that merchants might pay lower MDFs and pass savings on by lowering markups. Therefore, to ensure that issuers in the U.S. will co-badge their credit cards and consumers will receive

---

103. IFR STUDY, *supra* note 72, at 194 fig. 75.

104. *Id.* at 191-92.

105. *Id.* at 196.

106. *Id.* at 195.

107. *See id.* at 196.

108. *See id.* (“Nearly two thirds of issuers reported that they did not receive requests from their customers asking for co-badging of cards beyond their current offer.”).

109. *See* Press Release, Merchs. Payment Coal., *supra* note 10.

110. *Id.*

and use them, co-badging itself and the issuing of co-badged cards must be obligatory. Co-badging should enhance competition amongst network providers, not burden consumers.

Secondly, it must be ensured that merchants retain the final right to select the network for processing the transaction at the point of sale. The IFR grants this right of final choice to the consumers, 85% of whom were unaware of the possibility of making such a choice when paying with a co-badged card,<sup>111</sup> meaning in 85% of cases, the merchants effectively made this choice already.<sup>112</sup> Merchants are also much more motivated to gain sophistication in network selection, as they pay an estimated \$126.4 billion in fees per year.<sup>113</sup> Many retailers have reported interchange fees as one of their highest expenses, topped only by product and wages.<sup>114</sup> Since the best choice for merchants will likely be the cheapest choice, consumer and merchant interests align.

In summation, co-badging, when made obligatory, will cause lower interchange fees and benefit consumer welfare because network providers will be able to compete for the same transactions, and merchants will choose the cheaper option, thereby subjecting interchange fees to competitive pricing pressure.

#### *D. Anti-Blending Provisions*

In addition to ensuring that new and small network providers have a stronger position, it is integral that merchants are fully aware of the costs they pay to network providers. Blended MDF pricing prevents smaller merchants from making an informed choice when selecting the transaction network at the POS. Further, blended pricing gives acquirers an easy way of making up for losses in interchange revenue by adjusting other fees to maintain or only marginally decrease the blended rate that they charge merchants.

IFR Article 9 holds that the models under which acquirers price the MDF must include an unblended interchange rate by default.<sup>115</sup> Still, around 40% of merchants in the E.U. opted for a blended rate after the IFR came into effect, mostly due to administrative hurdles.<sup>116</sup> The same merchants, meaning those that opted for blended MDFs, experienced a decrease in interchange

---

111. IFR STUDY, *supra* note 72, at 196.

112. *See id.*

113. *See* Press Release, Merchs. Payment Coal., *supra* note 10.

114. *See* Christina Morales, *Using a Credit Card? At These Restaurants It'll Cost You*, N.Y. TIMES (Aug. 14, 2023), <https://www.nytimes.com/2023/08/14/dining/restaurant-credit-card-fees.html>.

115. IFR STUDY, *supra* note 72, at 151.

116. *Id.* at 152.

costs by around 0.08%, while merchants that chose the non-blended MDF reported an average decrease of more than 20.<sup>117</sup> This shows that an unblended rate that individually assesses the interchange fee gives acquirers less opportunity to make up for losses by raising other fees and is thereby much more effective at passing through lower interchange fees from acquirers to merchants.<sup>118</sup> Similarly, an unblended display of the interchange fee is essential to ensure transparency. Only with a non-blended fee are merchants adequately informed when selecting their preferred processing network at the POS as proposed in the article's previous section.

The European Central Bank stressed the importance of unblended fees during the conception of the IFR.<sup>119</sup> Any regulatory reform of anti-blending provisions would have to include an individual display of "fees paid (by merchants) for each category and . . . individual brand (of card) for which the acquirer provides services."<sup>120</sup> This way, transparency and informed decision-making are ensured, and merchants will know the exact fees they will surcharge their consumers.

#### *E. Unified and Amended Surcharge Rules*

Lastly, based on the problems explained until this point, a unified and amended surcharge provision is essential for the success of the proposed regulations. To be effective, surcharge provisions must fulfill three main criteria: (1) surcharging is unified and not contractually modifiable, (2) surcharging is mandatory, and (3) surcharging is capped at all payment processing fees that the merchant pays to the acquirer.

With this in mind, merchants will be given simple and clear surcharging instructions while ensuring that consumers are not excessively surcharged and that potential savings are passed through. Further, effective surcharge rules would eliminate regressive cross-subsidization since every consumer would pay their own transaction fee. Consumers would be enabled to make an informed choice about their preferred payment method at the payment terminal thereby create competitive pressure. When viewed in unison with the other regulations proposed in this article, transactions would most likely be routed through the cheapest network if merchants were able to choose the preferred processing network (as discussed in the section regarding co-badging), know which fees applied for the transaction (as discussed in the section regarding blended fees), and consumers would be able to make an

---

117. *Id.*

118. *See id.*

119. *See* Opinion of the European Central Bank, 2014 O.J. (C 193/2) ¶ 2.

120. *Id.*

informed decision about which payment method to use based on surcharges which will have to be disclosed before the transaction is initiated.<sup>121</sup> As a result, interchange fee pricing, now subject to consumer and merchant decisions, will finally be set in a competitive environment and improve consumer welfare.<sup>122</sup>

As part of the “Revised Payments Services Directive” (“PSD2”), the E.U. has allowed surcharging on non-fee-regulated cards, meaning cards that are not subject to the statutory fee cap.<sup>123</sup> Provided there is no contrary national legislation,<sup>124</sup> merchants can surcharge on certain transactions, importantly on transactions made with commercial credit cards which carry significant volume. While this regulation was welcomed by around 60% of merchants who applied surcharges on commercial credit card transactions data suggests it lacked impact because network providers raised other fees and, at least in part, due to consumer confusion. Since fee regulation in the form of statutory fee caps has shown to be ineffective, the latter issue can be bypassed by requiring surcharging for every credit card transaction.<sup>125</sup>

(1) First, surcharge provisions need to be federal or unified. State rules pose a significant hurdle to surcharging for merchants, particularly for merchants operating in multiple states, because they are constantly changing and non-uniform.<sup>126</sup> In addition to this, network providers can impose contractual restrictions on surcharging when surcharging itself does not affect networks beyond the fact that the consumer is now confronted with the actual cost associated with the transaction. It is crucial that issuers are prohibited from regulating surcharges in their contracts with merchants.

(2) Secondly, surcharging must be mandatory. This is important to overcome competitive pressures on smaller merchants that occur when surcharging is voluntary. Those opposing surcharging often claim that

---

121. See RONALD J. MANN, CHARGING AHEAD: GROWTH AND REGULATION OF PAYMENT CARD MARKETS 122 (1<sup>st</sup> ed. 2006); Merchant, *supra* note 2, at 367 (first citing Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005); then citing Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. No. 111-24, 123 Stat. 1734 (2009); and then citing Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010)).

122. Merchant, *supra* note 2, at 370 (quoting *in re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 986 F.Supp.2d 207, 231 (E.D.N.Y. 2013)).

123. See Council Directive 2015/2366, 2015, O.J. (L 337/35) ¶ 1 (EU).

124. See IFR STUDY, *supra* note 72, at 203 (identifying Belgium, Bulgaria, Croatia, France, Hungary, Latvia, Lithuania, Malta, Portugal, Spain, and Romania for not allowing surcharging on commercial cards).

125. See *id.* at 139, 182, 203; BUNDESKARTELLAMT, 2022 REVIEW OF THE SECOND PAYMENT SERVICES DIRECTIVE (PSD2) - CONTRIBUTION BY THE BUNDESKARTELLAMT ON SURCHARGING 2 (2022).

126. See Levitin, *supra* note 32, at 10.

smaller merchants will not surcharge due to the risk of driving away customers.<sup>127</sup> This argument concerns small merchants in particular since they are usually not able to compete with larger merchants on product prices. In Australia, where surcharging is non-obligatory, payment service provider Tyro reported that out of its more than 66,000 customers in May 2023, “40 per cent of cafes and restaurants levied surcharges, compared to 25 percent in May 2022.”<sup>128</sup> Although the sample is arguably small compared to a total of 12,44 million credit card accounts in Australia,<sup>129</sup> this still shows a dramatic increase in surcharging by typically small businesses. Since implementing the IFR, 60% of all merchants in the E.U. impose surcharges where permitted.<sup>130</sup> While the numbers are fairly high, one must bear in mind that both these jurisdictions have imposed a statutory cap on interchange fees. This lowers surcharges and therefore reduces the competitive risk merchants take when surcharging. In Australia, the credit card interchange fee for a domestic transaction is 0.20% for Mastercard<sup>131</sup> and 0.21% for Visa.<sup>132</sup> In the E.U., for similar transactions where the merchant and issuer are located within the E.E.A., the interchange rate is typically 0.30% for Mastercard and 0.30% for Visa.<sup>133</sup>

---

127. Martha C. White, *A 4% Surcharge for Using a Credit Card!? Now Legal – but Not Likely*, TIME BUS. (Jan. 25, 2013), <https://business.time.com/2013/01/25/a-4-surcharge-for-using-a-credit-card-legal-but-not-likely/>.

128. John Collett, *More shoppers stung with card surcharges as cafes, pubs seek savings*, SYDNEY MORNING HERALD (June 20, 2023), <https://www.smh.com.au/money/banking/more-shoppers-stung-with-card-surcharges-as-cafes-pubs-seek-savings-20230609-p5dff2.html>; see also Katie Nelson, *Credit Card Surcharges: A Deep-Dive Into Surcharging, Customer Sentiment & What Other Businesses Are Doing*, LIGHTSPEED (Sept. 20, 2023), <https://www.lightspeedhq.com.au/blog/credit-card-surcharges/>.

129. See Sean Callery, *Credit Card Debt Statistics 2025*, MONEY.COM.AU, <https://www.money.com.au/credit-cards/credit-card-statistics> (last updated Dec. 31, 2024).

130. IFR STUDY, *supra* note 72, at 203.

131. *Understanding Interchange: Find Out what Interchange is and the Value it Delivers*, MASTERCARD, <https://www.mastercard.com.au/en-au/business/overview/support/interchange.html> (last visited Feb. 24, 2025) (referring to non-tokenized, card-present transaction percentage is under Australia Intercountry Credit POS Interchange Rates next to “Consumer Standard – Other Card Present”).

132. *Interchange is a Part of the System that Makes Electronic Payments Possible*, VISA, <https://www.visa.com.au/about-visa/interchange.html> (last visited Feb. 24, 2025) (referring to non-tokenized, card-present transaction percentage found under Domestic Visa Credit Interchange Rates next to “Standard Rate”).

133. *Intra-EEA – Interchange Fees*, MASTERCARD (Sept. 15, 2025), <https://www.mastercard.com/europe/en/regulatory/european-interchange.html> (referring to credit card interchange fee in Australia found in MasterCard Intra-EEA Interchange Fees PDF next to “Mastercard Consumer Credit”); VISA, *INTRA EUROPE EEA – MULTI-LATERAL INTERCHANGE FEES* 1 (2024), [chrome-extension://efaidnbmninnbpcapjcgclclefindmkaj/https://www.visa.co.uk/content/dam/VCOM/regio](https://chrome-extension://efaidnbmninnbpcapjcgclclefindmkaj/https://www.visa.co.uk/content/dam/VCOM/regio)

In the U.S., interchange rates range between 2.10% and 2.30% for comparable Visa transactions,<sup>134</sup> and between 1.85% to 2.00% for Mastercard transactions.<sup>135</sup> Small merchants would take on a much larger competitive risk when deciding to surcharge, which makes surcharging more unlikely. Although it has proven difficult to find data on how many small businesses in the U.S. surcharge in states that permit the practice, the emerging consensus among financial news outlets indicates that even though small businesses like cafes and restaurants increasingly impose surcharges on customers,<sup>136</sup> the total number of small businesses surcharging is still comparably low.<sup>137</sup> By obligating merchants to a surcharge, particularly smaller merchants would still benefit from being able to externalize transaction costs while not taking a competitive risk.

Above all, surcharging should be mandatory to ensure savings are passed through to consumers.<sup>138</sup> Experience with debit card interchange fee caps shows that issuers will most likely compensate for losses in interchange revenue by raising banking fees. Consumer welfare can only be achieved if consumers' savings through lower interchange fees outweigh any potential increase in banking fees.<sup>139</sup> Otherwise, this proposal could go as far as to

---

nal/ve/unitedkingdom/PDF/fees-and-interchange/april2024/intra-europe-eea-interchange-apr24.pdf.

134. See VISA, VISA USA INTERCHANGE REIMBURSEMENT FEES: VISA SUPPLEMENTAL REQUIREMENTS 10 (2024), chrome-extension://efaidnbmnnnibpcajpcgclefindmkaj/https://usa.visa.com/dam/VCOM/download/merchants/visa-usa-interchange-reimbursement-fees.pdf.

135. MASTERCARD, MASTERCARD 2022-2023 U.S. REGION INTERCHANGE PROGRAMS AND RATES 2 (2022), chrome-extension://efaidnbmnnnibpcajpcgclefindmkaj/https://www.mastercard.us/content/dam/public/mastercardcom/na/us/en/documents/merchant-rates-2022-2023-apr22-2022.pdf (referencing Restaurants within U.S. Region Mastercard Consumer Credit Rates).

136. See Sabrina Trangle, *Credit card surcharges are popping up at more merchants*, NEWSDAY BUS. (Oct. 21, 2022), <https://www.newsday.com/business/credit-card-surge-cash-discount-i47rr8bh>; Medora Lee, *Americans relying less on cash, more on credit cards may pay more fees*, *Here's why*, USA TODAY, <https://www.usatoday.com/story/money/personalfinance/2023/10/25/cash-credit-card-fee/71246025007/> (last updated Oct. 25, 2023).

137. See WSJ Podcasts, *More Stores Tack on Fees for Credit-Card Purchases*, WSJ, at 1:45 (Aug. 20, 2021), <https://www.wsj.com/podcasts/google-news-update/more-stores-tack-on-fees-for-credit-card-purchases/3e71c9e9-b14c-4c78-860f-dd365b539b35> (last visited Feb. 24, 2025); THE STRAWHECKER GROUP, U.S. SURCHARGING SNAPSHOT REPORT 5 (2022), <https://thestrawgroup.com/u-s-surcharging-snapshot/>.

138. Merchant, *supra* note 2, at 370 (quoting Daniel Fisher, *WalMart's 'Swipe Fees' are a Political Weapon Against Visa*, FORBES (July 24, 2012, 3:59 PM), <https://www.forbes.com/sites/danielfisher/2012/07/24/wal-marts-swipe-fees-are-a-political-weapon-against-visa/>).

139. See Press Release, Michelle W. Bowman, Bd. of Governors of the Fed. Rsrv. Sys., Statement on Proposed Revisions to Regulation II's Interchange Fee Cap (Oct. 25, 2023),

harm consumers. Reliable data tracing the pass-through of reduced interchange fees from merchants to consumers in the form of lower product prices is notoriously difficult to obtain.<sup>140</sup> Where data is available, it is usually anecdotal in nature, which impairs its applicability in other situations.<sup>141</sup>

(3) Thirdly, surcharging must be capped at ‘all payment processing fees that the merchant pays to the acquirer’ in order to prevent merchants from exploiting consumers. This broad definition protects consumers from excessive surcharging by merchants and protects merchants from acquirers that might try to raise fees that are not part of the MDF but are still charged for every transaction.

As an alternative to surcharging, many merchants in the U.S. have opted to impose either a cash discount or “convenience” or “service fees,” all of which are subject to certain rules and restrictions by network providers.<sup>142</sup> While cash discounting is mathematically equivalent to surcharging (consumers paying with cash get a discount in the amount that the merchant has raised product prices to compensate for transaction fees), it suffers from two issues. First, since cash payers do not pay for transaction fees, they are excluded from regressive cross-subsidization. Nonetheless, those paying with low-fee cards will still pay for the rewards of those paying with high-fee cards.<sup>143</sup> Furthermore, behavioral economics suggest that cash discounting is less effective than surcharging at steering the consumer’s decision-making when choosing a payment method. Two concepts in particular speak for this, the “framing bias”<sup>144</sup> and “loss aversion.”<sup>145</sup> A framing bias means that a surcharge, irrespective of mathematic equivalence, will provoke more negative reactions than a cash discount will provoke positive reactions.<sup>146</sup> Loss aversion implies that a loss (in this case, the loss of money due to surcharges) carries more weight than a gain (in this case, money saved due to cash discounts) of an equivalent amount.<sup>147</sup> Both mean

---

<https://www.federalreserve.gov/newsevents/pressreleases/bowman-statement-20231025.htm>.

140. See IFR STUDY, *supra* note 72, at 182.

141. See *id.*; Haltom & Wang, *supra* note 81, at 3.

142. See *Visa Rules and Policy, Frequently Asked Questions*, VISA, <https://usa.visa.com/support/consumer/visa-rules.html> (last visited Jan. 10, 2025) (see questions, “Can I charge a convenience fee for accepting a Visa card?” and “Can I charge a service fee for accepting a Visa card?”).

143. See Levitin, *supra* note 32, at 35.

144. See *id.* at 24.

145. Merchant, *supra* note 2, at 352 (quoting *Expressions Hair Design v. Schneiderman*, 808 F.3d 118, 122 (2015)).

146. *Id.* (quoting Adam J. Levitin, *The Antitrust Superbowl: America’s Payment Systems, No-Surcharge Rules, and the Hidden Costs of Credit*, 3 BERKELEY BUS. L.J. at 17 (2005)).

147. See Levitin, *supra* note 32, at 39.

that a surcharge is much more likely to keep a consumer from paying with his credit card and demonstrate the need to include surcharge provisions above all other means of externalizing costs, such as cash discounting.

In conclusion, only unified and clear surcharge rules will keep issuers from regulating surcharges in their contracts with merchants and will keep administrative difficulty at a minimum. Surcharges need to be mandatory in order to ensure smaller merchants are not disadvantaged and to ensure consumers actually benefit from savings. Surcharges must also be capped at all transaction fees to protect consumers from excessive surcharging and merchants from exploitation of other fees by acquirers.

## V. CONCLUSION

In conclusion, obligatory surcharge provisions are the core of this proposal, not least because they directly target the consumer's choice. This, in synthesis with empowering merchants through regulating current constraints, is a highly effective way of ensuring a healthier, more competitive market for pricing interchange fees.

The European IFR includes many provisions that can be meaningfully amended to loosen the grip that Visa and Mastercard have on the U.S. market for processing transactions and setting interchange fees. This article has demonstrated how effective changes to existing regulations and the introduction of new regulations can successfully ensure consumer welfare by creating an environment where interchange fees are priced competitively and where the choice of those who pay them has economic value.