

SB 2745

Measure Title: RELATING TO CREDIT CARDS.

Report Title: Credit Card Transactions; Surcharge

Description: Prohibits retailers from imposing credit card surcharges in certain instances.

Companion:

Package: None

Current Referral: CPN

Introducer(s): ENGLISH, BAKER, CHUN OAKLAND, DELA CRUZ, GREEN, KEITH-AGARAN, SOLOMON, Espero, Gabbard, Galuteria, Hee, Ige, Ihara, Kidani, Kim, Nishihara, Ruderman, Shimabukuro, Taniguchi, Tokuda, Wakai



NEIL ABERCROMBIE
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PRESENTATION OF THE
OFFICE OF CONSUMER PROTECTION

TO THE COMMITTEE ON COMMERCE & CONSUMER PROTECTION

THE TWENTY-SEVENTH
REGULAR SESSION OF 2014

FEBRUARY 19, 2014
9:00 AM

COMMENTS ON S. B. 2745, RELATING TO CREDIT CARDS.

TO THE HONORABLE ROSALYN H. BAKER, CHAIR,
AND TO THE HONORABLE BRIAN T. TANIGUCHI, VICE CHAIR,
AND MEMBERS OF THE COMMITTEE:

The Department of Commerce and Consumer Affairs ("DCCA"), Office of Consumer Protection ("OCP") appreciates the opportunity to appear today and offer comments on S.B. 2745, Relating to Credit Cards. My name is Bruce B. Kim and I am the Executive Director of OCP.

S.B. 2745 prohibits retailers from imposing a surcharge on credit card transactions to account for fees charged to retailers by credit card companies for the use of their credit card. It also allows retailers to offer discounts for the purpose of inducing payment by cash, check or other means not involving the use of a credit card if

the discount is offered to all prospective buyers.

Credit card companies have imposed restrictions in their agreements with merchants who accept their cards preventing the merchants from charging a "surcharge" on customers for swipe fees the merchants incur each time the card is used. Businesses object to not being able to pass on these fees to their customers in the form of a "surcharge". Recent antitrust litigation against VISA and MasterCard has resulted in a settlement in which VISA and MasterCard agreed to allow retailers to impose credit card "surcharges" on credit card transactions after January 27, 2013. American Express settled a separate antitrust case by agreeing in part to allow "surcharges" if the merchant imposed surcharges on all credit card transactions. Accordingly, a merchant who accepts American Express as well as VISA or MasterCard may now impose a "surcharge" under these settlements.

The "surcharge" issue does not affect cash, check or debit card transactions and a "surcharge" on credit card transactions is currently banned in 10 states, including New York, California and Texas.

Some consumer advocates maintain that laws banning credit card surcharges actually hurt cash customers who do not benefit from the free rewards offered to credit card users by the card networks. They argue that cash customers are generally less affluent than card users and unfairly bear a greater proportionate share of the retailer's costs associated with credit card transactions through a hidden regressive subsidy. In addition, some argue that banning surcharges on credit card transactions but allowing

the retailer to offer discounts on cash, check or debit card transactions is a de facto surcharge.

The U.S. District Court in the Southern District of New York recently issued a preliminary injunction barring New York from enforcing its ban on credit card surcharges. *Expressions Hair Design v. Schneiderman*, 2013 WL 5477607 (S.D.N.Y. 2013). The Court held that the businesses and individuals challenging the anti-surcharge statute were entitled to a preliminary injunction because the law violated their First Amendment free speech rights and was unconstitutionally vague. The District Court Judge also refused New York's request to dismiss the plaintiffs' claims that the law was preempted under the federal Sherman Antitrust Act. In discussing the preemption claim, the Court in its ruling stated:

Surcharge bans like section 518 thus in effect force cash users (who are said to be disproportionately poor and minority persons), to subsidize the retail purchases of credit card users. See Adam J. Levitin, *Priceless? The Social Costs of Credit Card Merchant Restraints*, 45 *Harv. J. on Legis.* 35 (2008); . . . This hidden, regressive subsidy for credit card usage is not insubstantial. See Scott Schuh, Oz Shy & Joanna Stevens, *Who Gains and Who Loses from Credit Card Payments?* at 21 (Fed. Reserve Bank of Boston, Public Policy Discussion Paper No. 10-03, 2010)("The average cash-paying household transfers \$149 . . . annually to card users," each of whom on average "receives a subsidy of \$1,333 . . . annually from cash users.")

In summary, OCP recognizes the legitimate concern that credit card surcharges

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be limited to actual costs related to use of the credit card, but urges the committee to also consider the impact this bill will have on non-credit card users.

Thank you for the opportunity to submit testimony on S.B. 2745. I would be happy to answer any questions members of the committee may have.



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Presentation to
Committee on Commerce and Consumer Protection
February 19, 2014 at 9:00 am
State Capitol Conference Room 229

Testimony in SUPPORT of S. B. 2745

TO: The Honorable Rosalyn H. Baker, Chair
The Honorable Brian Taniguchi, Vice Chair
Members of the Committee

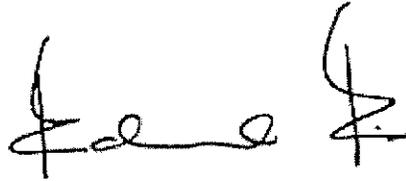
My name is Edward Pei and I am the Executive Director of the Hawaii Bankers Association (HBA). HBA is the trade association representing all FDIC insured depository institutions operating in the State of Hawaii.

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, ten 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 many 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 options. 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.

We do have one question regarding this bill and its intent. The language suggests that "retailers" will be prohibited from assessing credit card surcharges. Is this intended to only affect retailers or are other credit card merchants, such as hotels, restaurants, airlines, taxi cabs, hospitals, and the like, also included? If so, since it does not appear that the term "retailer" is defined, perhaps a better term would be "credit card merchant".

In conclusion, we support SB2745 and the right of our consumers to use their payment device of choice to complete transactions at the point of sale. Thank you for this opportunity to submit our testimony and please let us know if we can provide any further information on this matter.

A handwritten signature in black ink, appearing to read 'Edward Y. W. Pei', with a stylized flourish at the end.

Edward Y. W. Pei
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Chamber of Commerce HAWAII
The Voice of Business

**Testimony to the Senate Committee on Commerce and Consumer Protection
Wednesday, February 19, 2014 at 9:00 A.M.
Conference Room 229, State Capitol**

RE: SENATE BILL 2745 RELATING TO CREDIT CARDS

Chair Baker, Vice Chair Taniguchi, and Members of the Committee:

The Chamber of Commerce of Hawaii ("The Chamber") **opposes** SB 2745 Relating to Credit Cards.

The Chamber is the largest business organization in Hawaii, representing over 1,000 businesses. Approximately 80% of our members are small businesses with less than 20 employees. As the "Voice of Business" in Hawaii, the organization works on behalf of members and the entire business community to improve the state's economic climate and to foster positive action on issues of common concern.

The Chamber opposes SB 2745 because we believe that it is unnecessary and overreaching. Consumer can already decide whether not to purchase goods or services from a business if they do not like the additional fee being charged. Consumers also have the choice to pay with cash or debit card. Also, present guidelines require merchants to place the fee on very receipt.

Thank you for the opportunity to testify.



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TO:
THE SENATE COMMITTEE ON COMMERCE AND CONSUMER PROTECTION
Senator Rosalyn Baker, Chair
Senator Brian Taniguchi, Vice Chair

FROM: HAWAII FOOD INDUSTRY ASSOCIATION
Lauren Zirbel, Executive Director

DATE: February 19, 2014
TIME: 9am
PLACE: Conference Room 229

RE: SB 2745

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.



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Testimony Regarding SB2745 Credit Card Companies' "Hidden Fee" Legislation

Committee on Commerce and Consumer Protection
Wednesday, February 19, 2014

Introduction and Overview:

Ms. Chairwoman 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.

Historically, credit card networks and their large financial institution partners were sheltered from engaging in meaningful price competition, placing credit cards beyond the reach of market forces. Businesses could not negotiate with the dominant credit card companies for lower fees by threatening to steer consumers to a lower cost payment form because their agreements have

traditionally precluded them from doing so. Indeed, merchants were precluded by these agreements even from educating their customers about how card-use increased the prices for all consumers.

All of this began to change for the better over the past year when the card networks agreed through government and private antitrust settlements to reform their point-of-sale rules to allow transparency in pricing and for merchants to use discounts and surcharges to send price signals to consumers, enhancing choice and lower costs. These marketplace reforms were included in the 2012 \$7.2 billion settlement agreed to by MasterCard and Visa, which was finally approved by a federal judge in December 2013, and also by a recent settlement agreed to by American Express last month.

This hidden fee legislation seems to be part of an end-run effort to undo the key marketplace reforms included in those settlements. This legislation isn't about protecting consumers; it is about credit card companies fighting to protect opaque and anti-competitive pricing practices that increase fees for businesses and drive up prices for consumers. This "hidden fee" legislation would revert to the old way of doing business and replace transparency with secret fees, and discount opportunities with higher prices.

Why the Recent Settlement is Important:

The reforms included in these settlements 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 only toward a good or service, but a significant extra amount on every transaction 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 settlements with Visa and MasterCard, and with American Express, begin to do. They create 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 by allowing merchants to show their customers what portion of the transaction cost is attributable to the chosen credit card, and to provide those customers with lower cost alternatives.

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 choose to 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.

No Surcharge Legislation is Constitutionally Suspect

Beyond the economic and societal benefits for consumers of the reforms achieved in the recent settlements described above, outright bans on the ability to surcharge at the point of sale have recently been found to be unconstitutional.

The New York surcharge ban, set forth in §518 of the New York General Business Law provides: “No seller in any sales transaction may impose a surcharge on a holder who elects to use a credit card in lieu of payment by cash, check, or similar means.” N.Y. Gen. Bus. Law §518. That law was struck down by a federal judge in October 2013, who found that the New York statute violated the First Amendment and was unconstitutionally vague. In responding to the State’s defense of the statute as “pro-consumer”, Judge Rokoff wrote that, “...the statute actually perpetuates consumer confusion by preventing sellers from...educat[ing] consumers about the true costs of credit-card usage.” And it “would be perverse to conclude that a statute that keeps consumers in the dark about avoidable additional costs somehow ‘directly advances’ the goal of preventing consumer deception.”¹

Judge Gleeson, who presided over the Visa and MasterCard antitrust settlement agreed with Judge Rokoff’s assessment that these state no surcharge statutes “were enacted in the name of consumer protection at the behest of the credit-card industry....” And Judge Gleeson, himself, in his approval of the Visa and MasterCard settlement, wrote:

“Those state laws [banning credit card surcharging at the point of sale], properly understood, hurt the very consumers they were ostensibly enacted to protect by propping up high credit card acceptance costs. They aid and abet a regime in which the poorest consumers subsidize the awards conferred upon premium cardholders because merchants are prohibited from disfavoring those premium cards through surcharging.”²

¹ *Expressions Hair Design v. Schneiderman*, 13 CIV. 3775 JSR, WL 5477607 at 11 (S.D.N.Y. Oct. 3, 2013).

² *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, Memorandum and Order, December 13, 2013, at 36.

Make no mistake: the legislation before you today aims to unravel these pro-consumer reforms by eliminating the benefits of the recent settlements, 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.