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**On Behalf of**

**The National Association of Convenience Stores**

**Before the**

**U.S. House Committee on the Judiciary**

**Antitrust Task Force**

**H.R. 5546, The Credit Card Fair Fee Act of 2008**

**May 15, 2008**

**The Association for Convenience & Petroleum Retailing**

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Chairman Conyers, Ranking Member Chabot, and Members of the Committee, thank you for the opportunity to provide you with my views regarding the Credit Card Fair Fee Act, H.R. 5546. My name is Tom Robinson and I am President of Robinson Oil Corporation. My company, which is headquartered in San Jose, California, operates 34 gas stations and convenience stores throughout the San Francisco and Monterey Bay area of Northern California under the name Rotten Robbie. Robinson Oil is a privately owned family business. I am the third generation to operate the business and the fourth generation is active in the company as well.

I am here today representing the National Association of Convenience Stores (“NACS”). NACS is an international trade association representing the convenience store industry. The industry as a whole includes about 145,000 stores in the United States, generated \$577.4 billion in sales in 2007, sells nearly 80 percent of the gasoline in the nation, and employs about 1.7 million workers. It is truly an industry for small businesses; more than 60 percent of convenience stores are owned by one-store operators. NACS also helped found the Merchants Payments Coalition, which includes about 20 national and 80 state trade associations from diverse industries, to help promote a more competitive and transparent system of credit card interchange fees.

I am also a past President and active member of the Society of Independent Gasoline Marketers of America (“SIGMA”). SIGMA is a member of the Merchants Payments Coalition and subscribes to the views expressed in this testimony regarding the interchange fee system.

I want to thank you for holding this hearing today. Credit card interchange fees hurt my customers – who, in the end, pay for them – and hurt my business. I would like to first talk about why the interchange fee system as it exists today is an antitrust and economic problem as well as a problem for consumers and businesses. Then I'd like to give you my views as to why the Credit Card Fair Fee Act is a helpful solution to those problems.

### **Problems with Interchange Fees**

The American credit card interchange fee system has several enormous problems that are perniciously hidden from consumers. First, the way the fees are set represents an ongoing antitrust violation. Second, Visa and MasterCard have organized the system such that there is no functioning market for interchange fees and therefore market forces do not create downward pressure on the cost of interchange as would happen in a functioning market. Third, the system hurts consumers and businesses – with lower income consumers and smaller businesses shouldering a disproportionate share of the burden of the system.

#### **The Antitrust Problem**

I am not an antitrust lawyer. I am a businessman. Given my background, however, I can understand when there is an antitrust problem. I cannot agree with my competitors to charge the same prices. If we did that it would deprive consumers of the benefits of price competition and we would justifiably face civil and/or criminal charges. And we could not agree to charge the same prices even if we did so while meeting together as board members of our trade association, NACS. Yet that is precisely what the banks that issue credit cards have done for years.

Until recently, both Visa and MasterCard were associations – much like NACS – and under their umbrella banks that should compete with one another on the prices of their services

agreed to charge the same interchange fee. Despite the Visa and MasterCard initial public offerings, the situation is just as bad. While they have reached for a fig leaf to cover their illegal activity (and collectively set aside more than \$3.5 billion for litigation exposure), the same banks continue to agree to charge the same interchange fees and refuse to compete. I'm sure lawyers can explain this better than I can, but in my view this is simple. Banks, using the cover of Visa or MasterCard, agree to charge the same interchange fees. That is against the law and something must be done.

From my perspective, the best way to understand the antitrust problem is by looking at what would happen if the same situation prevailed in my industry. As I said, I am a member of NACS and its structure is not much different than Visa's and MasterCard's. NACS is governed by a group of its retailer members and others in the industry and it sets policy for the trade association. NACS does not and never has set the prices or terms by which its member companies charge and deal with the public. But let's say that it did and that NACS decided that its "default" price for a gallon of gasoline would be \$9 and that every independent member of NACS across the country charged that "default" price. The speed at which this Committee – and, by the way, the Justice Department – would haul us in front of them would be dizzying. I would fully expect someone to fit me with a nice orange jumpsuit after I'd finished explaining what we had done.

But that is precisely what Visa does with its banks and, separately, what MasterCard does with its banks. All these banks that are supposed to compete with each other charge the same "default" interchange fees and the rest of us have no choice but to pay them. Now, let's think about their arguments in light of this clear analogy. Visa and MasterCard say this isn't a problem because, after all, we don't have to accept their cards if we don't like how they price

them. In the hypothetical scenario of NACS setting gas prices, I could just as easily say that if anyone didn't like it they could choose not to buy gasoline. And Visa and MasterCard even have the audacity to argue that the fact that we accept cards proves they deliver a valuable service and that we think it's worth it. Would I get out of this room alive if I made the same argument about price-fixing by independent retailers of gasoline?

Let's take another argument that the small banks put forward. They argue that they have higher costs than large banks for issuing cards and that without centralized price-fixing they could no longer offer this card-issuing service to their customers. I could make the same argument in the hypothetical gasoline situation. The majority of my industry, more than 60 percent, are single-store operators. There is no doubt that these small businesses struggle to keep their expenses low enough to compete with their larger competitors. They would have a much easier time if there were price-fixing in the industry and no doubt they would be hurt if that price-fixing scheme were later taken away. But again, I don't think anyone on this Committee would be particularly sympathetic to the small gasoline retailers arguing that their businesses would be hurt if they weren't allowed to fix prices. It is ironic that businesses in my industry are sometimes accused of price gouging when the real gouging is being done to us by the banks that collude to fix prices.

If small banks are too inefficient to offer card-issuing services without price-fixing in the industry, then the answer that a competitive American economy should give to them is the same one it gives to competitors in every industry across the nation – find a way to be more efficient or get out of that particular portion of the business. It may be a tough message, but that is how our economy works for everyone except the small banks that issue cards.

## No Functioning Market

The antitrust problem created by this price-fixing activity has an enormous impact in the marketplace. Visa and MasterCard have market power such that I have no choice whether to accept their cards. Given their place in the market, if I don't take Visa or MasterCard my competitors will take them – and will take my customers. But don't just take my word for it. The Kansas City Federal Reserve has found that retailers like me have no realistic choice but to accept Visa and MasterCard.<sup>1</sup>

The banks present themselves collectively to retailers as Visa or MasterCard and present us with a take it or leave it offer – accept all our cards on all our terms at our collectively set prices or you can't accept any cards. That is abusive. Other companies that provide services to my stores negotiate with me. This happens on a daily basis. Virtually everything I purchase is the result of a competitive negotiation. I negotiate with suppliers, service providers and others. But interchange is not negotiable. Interchange fees are so significant that at six of my locations card fees are my #1 operating expense. Just at my stores, the fees went from \$3.5 million in 2006 to more than \$4 million in 2007 and my sales were flat or slightly down. That is a dramatic increase and it mirrors the dramatic increases we have faced industry wide.

Visa and MasterCard sometimes try to confuse the interchange fees with something they call the “merchant discount.” The merchant discount is the full amount by which the money I receive is less than the sale I made to the consumer. Most of that discount – perhaps 80 to 90 percent – is the interchange fee. There are some other fees imposed by my bank and processor, but those are minimal. I can also shop around or negotiate to get a better deal on those other fees. Many contracts call for merchants to pay the processing cost plus interchange. I can't shop

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<sup>1</sup> F. Hayashi, “A Puzzle of Payment Card Pricing: Why Are Merchants Still Accepting Card Payments?” *Review of Network Economics* at 172 (March 2006).

around or negotiate on interchange because every bank adheres to the collectively set default fees. Visa and MasterCard want to pretend there is no problem because I have some options on the small percentage of other fees making up the merchant discount. The fact that I can negotiate a penny or two off of the processing costs of a transaction has no bearing on the fact that I still have to pay the credit card companies 6 to 8 cents or more when selling a gallon of gasoline. In my experience interchange is always a full pass through to the retailer and competition on other fees cannot make up for the antitrust problem and lack of a market on interchange.

I have a chart showing the annual profits of my industry and the amounts paid to accept cards. A few years ago we were paying almost as much as we earned – and these are pre-tax numbers. In 2006, those figures flipped and we paid \$6.6 billion and only made \$4.8 billion. The 2007 figures are simply incomprehensible. My entire industry made pre-tax profits of \$3.4 billion. Note that our profits went down by more than \$1 billion. At the same time, card fees increased by \$1 billion to \$7.6 billion. Now we are paying far more than double our profits simply to accept cards. It is clear that the price for the cashless society is way too high if you let the credit card industry set the rate.

Every time you buy gasoline I ask you to remember this – the station you are buying it from is likely paying more than twice as much money to accept cards as it is making. Given the price of gasoline today an average retailer is paying between 6 and 8 cents in interchange fees (and some are paying more) on every gallon paid for with a credit card – and every time gas prices go up the card fees go right up with them. If you are concerned about prices at the pump you need to be concerned about interchange fees. These fees have simply taken over our industry. Some days I think I should just take down my “Rotten Robbie” signs and put up Visa and MasterCard signs. My business is more for them than it is for me.

It is impossible for anyone to look at this and credibly say that we don't have to accept cards. If we could stop accepting cards, we would. Cards are a huge drain on my business. Visa and MasterCard like to talk about the service they provide – and it does provide convenience – but it does not give me additional sales as they like to claim. I have never seen one of my customers' gas tanks grow because they got a credit card. My customers buy the amount of gas they need.

#### Visa and MasterCard Create These Problems

I wish I could stop taking cards. But not only is the market power of Visa and MasterCard so great that I have no choice, they put a legal straitjacket on me to make sure I can't refuse their cards. Visa has a rule, for example, requiring that if I want to take cards at one location I have to take cards at all of my locations. Think about that. Let's say that there were really only one or two of my locations where the competition was such that I had to accept cards to stay in business. That is not true for me, but let's assume it were. Visa would make me choose to accept cards at all thirty four locations – or lose those one or two locations. Or, put another way, now that I and most other retailers take cards, what is my realistic choice? Visa says I could decide not to take cards, but what retailer makes a dramatic change in its operations throughout a chain without testing it first. That would be suicide. If I had the ability to refuse cards, I or any reasonable businessperson would want to try it at one or two locations and see how well it worked. Visa prohibits me from doing that. They require that it is an all-or-nothing, take-it-or-leave-it choice. I can't put an entire business that has been in my family for four generations at risk that way – and Visa knows it. That is precisely why they have this rule. And for them to testify before you that I can simply choose whether or not to take their cards is shameless. They do everything they can to make that an impossible choice.



The card associations also have an honor all cards rule which severely limits my ability to make market decisions. This rule provides that if I want to take any of their cards I must take all of them – no matter how expensive they make their interchange fees on some of these premium cards. One aspect of this rule is understandable – part of the value of the Visa and MasterCard brands is that merchants like me will not discriminate based on which bank issued a particular consumer’s card. That means consumers do not have to worry where they get their card because it will be treated in the same way. I don’t take issue with that. But notice what they have done. Rather than an honor all issuers rule, Visa and MasterCard impose an honor all cards rule. And they have exploited that rule to a painful extent. They push more and more cards every year that carry higher interchange fees. Platinum cards, rewards cards, corporate cards and other offerings can carry with them much higher interchange rates than standard cards. By pushing these cards to consumers (often to existing consumers who have not even asked for a different type of card), Visa and MasterCard change the mix of cards consumers use and that results in dramatic price increases on interchange – even when the announced price changes are relatively modest. They don’t need to make many individual categories of cards more expensive if they convert more people to higher interchange fee cards. Once again, there is nothing I can do. If I am concerned about the high price of some of their most expensive cards my only choice is to not take any of their cards at any of my locations – or I can pay these abusive, exorbitant fees that often result in my selling gasoline at a loss. They know that as bad as these fees are I just can’t risk losing my customers by refusing to take Visa and MasterCard.

Frankly, Visa and MasterCard are much like telephones in the days when AT&T was a monopoly. They are essential for most everyone to do business. It is no more realistic for Visa and MasterCard to claim that their actions are OK because if merchants have the choice not to

accept cards than it would have been for AT&T to say their actions were OK because no one has to have a telephone. That is just not a real choice.

The card associations also like to say that they let me discount for cash. Very kindly of them in light of the fact that federal law won't let them prohibit me from discounting for cash. The problem here is that they do everything in their power to make it difficult to discount for cash. For example, they require that the credit price be treated as the full price and retailers have been instructed numerous times by their acquiring banks that the credit price must be more prominently displayed. Many types of retailers have so many different products in their stores that the double price marking this requires is just not a practical option. That is why you don't see cash discounts within stores. About the only place you see cash discounts is gasoline retailing because at the pump we tend to offer only a few products – regular, mid-grade, and premium gasoline. But Visa in particular has undertaken aggressive actions against gasoline retailers who try to discount for cash. In my state of California, for example, Visa threatened multiple retailers with fines of \$5,000 per day for offering cash discounts. These retailers simply posted two sets of prices – one for cash and one for credit. But Visa didn't like the higher price being called the “credit” price. I don't understand why because that is exactly what it was and gasoline retailers have displayed cash discounts that way for a long time. Visa, however, insisted that the higher price had to be called the “regular” price or the “full” price. The state of California, on the other hand, told retailers that we couldn't call that price “regular” or “full” because we offer “regular” as a grade of gasoline and full service as opposed to self-service. The state said that these labels would be confusing to consumers and violate consumer protection laws. But Visa still insisted on these changes being made – or they would impose \$5,000 per day in fines. Thankfully, some Members of Congress got involved and Visa backed off – in

California – but Visa has taken similar actions in other states and successfully intimidated many retailers so that they no longer offer cash discounts.

I want to emphasize the coercive power that Visa and MasterCard have in these situations and how they use it. In my industry, a single store in 2007 made an average pre-tax profit of about \$23,000 per year. As I said, Visa in California was threatening stores – including at least one individual who only owned a single store and used what he made from that single store to support his family – with fines of \$5,000 per DAY. How do you think a retailer reacts to this kind of threat? Predictably, most of them are not willing to risk bankruptcy for a fight with Visa and they back down. So, Visa says we can choose not to take cards or discount for cash and that takes care of the interchange problem. But because of their market power and their aggressive actions, both of those possibilities can threaten the existence of merchants' businesses. The card associations know this and that is why they pile the pressure on us. They know we have no realistic choice but to agree to any terms that they dictate.

In fact, they know we have no choice but to let them dictate the terms because they do it from day one of the commercial relationship. Merchants like me sign a short contract with our bank or processor that allows us to accept Visa and MasterCard. My contract is about 15 pages. But the contract incorporates by reference more than 1,000 pages of rules that govern the contractual relationship. I didn't get to see those rules before I had to sign a contract and agree to them. We have complained about this for years. Even people who normally are supportive of the card associations seem to recognize the unfairness in making merchants agree to and comply with rules that they cannot see.

Thankfully, due to the attention of the Members of this Task Force and others in the Congress we are starting to see a little change. Visa has announced that today – the day of this

hearing – they will allow us to see their rules without having to sign a nondisclosure agreement. While it is long overdue, I applaud them for finally disclosing their rules. I am still a little skeptical, however, because we have heard similar announcements in the past. More than two years ago when a House Energy and Commerce Subcommittee had a hearing on this issue the card companies said they made all their rules available on their website. That, of course, was false. When the Senate Judiciary Committee had a hearing in 2006, Visa announced that they were making their rules available. Unfortunately, at that point they only allowed merchants to see the rules AFTER the merchant signed a contract agreeing to abide by them and only AFTER the merchant signed the non-disclosure agreement. I hope the change announced by Visa is what they claim and that all the rules will be available to merchants without conditions and before they have to sign an agreement. Past experience shows that when they say they are making rules available we need to watch out for the exceptions they aren't telling us.

That, however, leaves MasterCard. Just recently, MasterCard released about 500 pages of its rules in addition to the excerpts it previously made available to merchants. MasterCard claimed these, at long last, were all the rules that were relevant to merchants. But their claim is plainly wrong. There are multiple examples of information that is very important to merchants but does not appear in the rules that MasterCard makes available. It is somewhere in the rules that we are not allowed to see. One clear example is the issue of fines. I already mentioned that Visa threatened California retailers with fines of \$5,000 per day for having the temerity to offer cash discounts. Retailers are threatened with fines from the card associations on a regular basis for different types of violations of the voluminous rules. The information that MasterCard makes available, however, does not include anything indicating the amount of fines that can be imposed for different types of violations, how those fines are determined and the like. I can't

think of a merchant who wouldn't consider that important information to know. Visa, by the way, has never made information about fines available before today either but perhaps we can all learn something when we look at their website this afternoon. For MasterCard to claim that it gives merchants everything they need to know and then not tell us how much we will be fined for different violations is completely disingenuous. The fines aren't the only thing missing, but they are egregious. MasterCard has no excuse for not making its entire set of rules available.

I should be clear though – making the rules available is not enough. Many of the rules are anticompetitive and abusive and need to be changed or eliminated. I have already briefly touched on the single entity rule, the honor all cards rule, and the abusive use of the no surcharge rule to stop discounting for cash. Walking through all of the problems of which we are aware in the rules would take a long time, but the area of chargebacks deserves special mention.

Chargebacks are the term used by the card associations to refer to situations in which they take the retailer's money. In some situations they can take the entire amount of a transaction out of the retailer's pocket and in other situations they only take part of it, but either way they are taking our money.

It is important to understand that the card associations justify interchange on the basis that they are taking the credit risk and guaranteeing the retailer payment. Except the card associations do not deliver on this supposed promise. Instead, they push the credit risk onto the retailers and do not guarantee payment. Their actions belie their justifications for interchange.

The card associations take our money for many different reasons. Importantly, they take our money for many transactions that they determine are fraudulent or result from unauthorized use of a card. Remember we get an authorization at the pump and the card associations justify their fees based on taking this risk – and justify high interest rates charged to consumers the

same way – but we end up paying for a great many transactions this way. The card associations don't mention that too often. But the one that has really harmed my industry is referred to in Visa's rules as "reason code 96." If Visa has really put its rules on its website, then maybe today I can actually find out what reason codes 1 through 95 are, but this particular one is number 96 and MasterCard has a similar rule.

Reason code 96 provides that when a credit card is swiped at the pump prior to a fill-up, Visa and MasterCard put a \$75 limit on the transaction. Until last month Visa's limit was \$50, but they changed it following years of complaints. When gas prices rose and people started paying more than \$50 or \$75 for a tank of gas in significant numbers, my industry started losing big money on these transactions. That is because if a transaction exceeds that limit, Visa claimed the right to chargeback the entire amount of the transaction – not the amount over \$50 but the entire amount of the transaction. Visa just recently changed that practice and now treats these like MasterCard by only charging back the amount by which the transaction exceeds \$75. While that is still unfair, it is far better than the practice Visa employed for years.

Consider for a moment the fact that some folks in my industry sell diesel fuel to truckers. Many of those stations no longer allow truckers to use card readers to pay at the pump, but for quite some time they did and those fill-ups can be as much as \$800 or more in some cases. That means when the transaction is made at the pump the retailer can lose \$725 on a single sale. To understand how much money that is to a retailer it helps to know something about margins in our industry. In good years, retailers tend to sell with a margin of 10-15 cents per gallon above the cost they pay for gasoline at wholesale. And that margin is before the interchange fees are deducted from the retailers' revenues. Right now most retailers are operating at margins significantly less than 10-15 cents, but assume retailers are having an absolutely great year and

selling at a margin of 15 cents. Interchange fees are between 6 and 8 cents per gallon now so the real margin even if this were a great year for the industry (which it isn't) would be about 7 cents per gallon. That means to make back the \$725 that Visa has taken from some retailers on a single diesel sale, the retailer needs to sell another 10,357 gallons. The truth is we never really make up for those losses and the chart demonstrates graphically that we just keep losing more money.

How often do these reason code 96 chargebacks happen? They don't happen every time a transaction exceeds the limits – different card issuing banks treat these situations differently – but we have seen individual months in which the total dollars taken from retailers due to these chargebacks exceeded \$100 million. I'm afraid to find out how many gallons of gasoline retailers would have to sell to make back the money taken from them in just one of those months. My calculator doesn't have that many digits so I don't know the answer.

#### Public Policy Problems with the System

The antitrust violations by Visa and MasterCard and the problems created in the business relationship and the marketplace are, of course, severe public policy problems. But the anti-consumer effects of the system Visa and MasterCard have created are additional policy problems that may not be as obvious at first glance. The costs that Visa and MasterCard impose are, in the end, borne by consumers. These consumers, however, get no notice or disclosure about interchange fees. They, just like the merchants they frequent, have no idea how much interchange is charged for their cards – and many don't know that interchange is charged at all. In fact, the Visa and MasterCard rules constraining how retailers can list their prices are designed to make interchange invisible to consumers. That means consumers cannot make rational economic decisions about whether using their cards is worth the cost it imposes on the

transaction. Not only does it look like using the card is free for the consumer, many consumers are offered so-called rewards of airline miles or other things as an inducement to use their cards. They don't know that they are paying far more through the inflated cost of goods and services than they will ever get back in the form of rewards. That is the deception inherent in the way that Visa and MasterCard have designed the system.

Another problem is that because of the way the rules require the cost of interchange to be buried in the cost of goods and services sold, all of us pay more for our goods to cover the cost of interchange – even if we don't use credit cards at all. That means people who don't have good credit and can only use cash pay extra to cover interchange. It also means that people who, for example, use food stamps pay more to cover interchange. This is a massive transfer of value in which lower income people pay more for their goods and services and a piece of their money goes out the door to pay for airline miles and rewards – particularly for people at the highest end of the income brackets who get the most generous rewards programs with their cards.

Not only that, Americans pay about 60 percent of all of the interchange paid throughout the entire world. Some of that is because there are more transactions here than in other countries, but a lot of it is because interchange rates are far higher here than in other countries. Our rates are about three times higher than the European rate, more than twice the British rate, and nearly four times the Australian rate. And Europe's Competition Commissioner has said even their much lower rate is unjustified and must be reduced because it currently violates their antitrust laws. What does this mean? I can only conclude that American consumers are getting the short end of the stick as Visa and MasterCard do just fine in other countries with far lower interchange fee levels.



Smaller businesses also pay higher fees. Some of the card associations' fee schedules are openly weighted to provide that larger businesses pay less. That is a questionable practice because this is not like some businesses in which certain fixed costs (delivery trucks for example) are lower on a per unit basis when more units are ordered. The infrastructure of the system is the same for me as it is for some of the giants in my industry. To the extent that my locations require their own hardware and software – and they do – that is an expense that I pay. Keep that in mind. The card associations tend to like talking about the investments they have made in the system and I don't dispute that they have made those investments. But I never hear them talk about the very large investments that merchants across the country have made in card readers, software systems and the like. Those investments are huge and benefit Visa and MasterCard tremendously – and those investments are a disproportionate burden on smaller businesses.

#### **The Solution – H.R. 5546**

What do we do about all of these problems? Chairman Conyers, Congressman Cannon and other Members on and off this Committee have given us a good answer to a multi-faceted problem. The Credit Card Fair Fee Act, H.R. 5546, seeks to create a competitive marketplace where none exists today. The bill would move us toward a competitive market by allowing for transparency and negotiation. It would allow merchants like me to negotiate as a group with Visa and its banks, on the one hand, and MasterCard and its banks on the other. This will simply help balance the scales of market power so that we can have negotiations about both the rates charged for interchange and the many pages of anti-competitive and abusive rules that are imposed on merchants.

This is just the type of approach that appeals to me as a businessman. I negotiate the prices and terms of nearly everything that happens with my business. This is the way that American businesses operate and I am comfortable with it.

The truth of the matter is that there are only three basic ways to deal with an antitrust problem like the one we have here. One way is to break up the card associations like the courts broke up AT&T in the 1980s. Another way is to have a regulator oversee the card associations like utilities and set their prices. The third way is to create a competitive marketplace where none exists today. H.R. 5546 opts for that third way and I think that is appropriate. Competitive markets are what make the American economy great – both for business and for consumers. Allowing for a negotiation with similar market power on each side of the table is a great way to create that competitive market.

Visa and its banks and, separately, MasterCard and its banks already deal with each individual retailer this way. They mass their market power and present us with their deals – take-it-or-leave-it – and each merchant deals with that individually. H.R. 5546 should be welcomed by the card associations because it would allow them to continue to act in just that way. It is hard to understand why huge financial institutions like Bank of America, Citibank, Wachovia, JP Morgan Chase, and others feel the need to combine their market power and agree with each other (through the card associations) to charge exactly the same rates and impose exactly the same terms, but they seem to believe this activity is essential. H.R. 5546 accepts that situation even though there are many reasons to think that these huge combinations are in themselves a problem and that the associations should be broken up like AT&T. We agree with the decision of Chairman Conyers, Congressman Cannon and the other cosponsors of the bill to

take a narrower approach – accept the card associations as they have organized themselves but allow merchants a similar right.

Frankly, it is baffling to me that the card associations and banks object to negotiating on equal terms. It makes me wonder what exactly scares them. This is how business is done in most industries in the United States everyday – just without the combination of competitors acting together (as happens on the card side of the equation already). If they believe that their fees are so inflated that negotiating on equal terms will be a disaster for them, then that is all the more reason to require it. It simply proves my point about the problems in the system today. If they don't believe their fees are over-inflated, then they should welcome this type of negotiation. It allows their model to continue, makes their customers happy, and brings needed transparency to the system.

Of course, there must be some way to deal with the situation if no deal is reached in negotiations. The card associations would have no reason to bargain in good faith to change a system that is unfairly slanted to their own advantage without some provision about what happens when negotiations fail. The sponsors of the Credit Card Fair Fee Act have devised a good solution to that issue. They provide that the two sides would each submit their best, final offers to a panel of judges and those judges would review the facts and pick the one that was closest to what would happen in a competitive market. The judges would be extremely constrained in their discretion and would not have the ability to set interchange rates or terms. They would not be allowed to pick some terms from offer "A" and others from offer "B." They would only be allowed to choose one offer or the other. This process is a minimal and necessary protection and this Committee has passed and amended a similar process to allow group negotiations in the licensing of music. This definitively is not price controls.

This process for dealing with a failed negotiation is what the card associations complain about – at least publicly. They say it amounts to government price controls. That may be a good, focus-group tested label for them to slap on this idea – it just isn't an accurate one. Government price controls occur when a regulator collects the necessary information and uses its discretion to set the price. It is not something that follows a market negotiation but is the only process at work and the regulator is the only decision-maker. The Credit Card Fair Fee Act, by contrast, allows the businesses involved to control their own destiny. They can negotiate a deal in any way they choose. And even if they don't reach a deal, no regulator compiles and sets a price. The parties each compile an offer and one is simply accepted.

The bottom line is that under this bill there will be a negotiated, agreed upon interchange system or whichever party comes up with a more reasonable offer will get that offer implemented. No government decision-maker will set interchange in any fashion. Calling this price controls is a mischaracterization and an insult to every one of the bipartisan group of sponsors of this carefully balanced legislation.

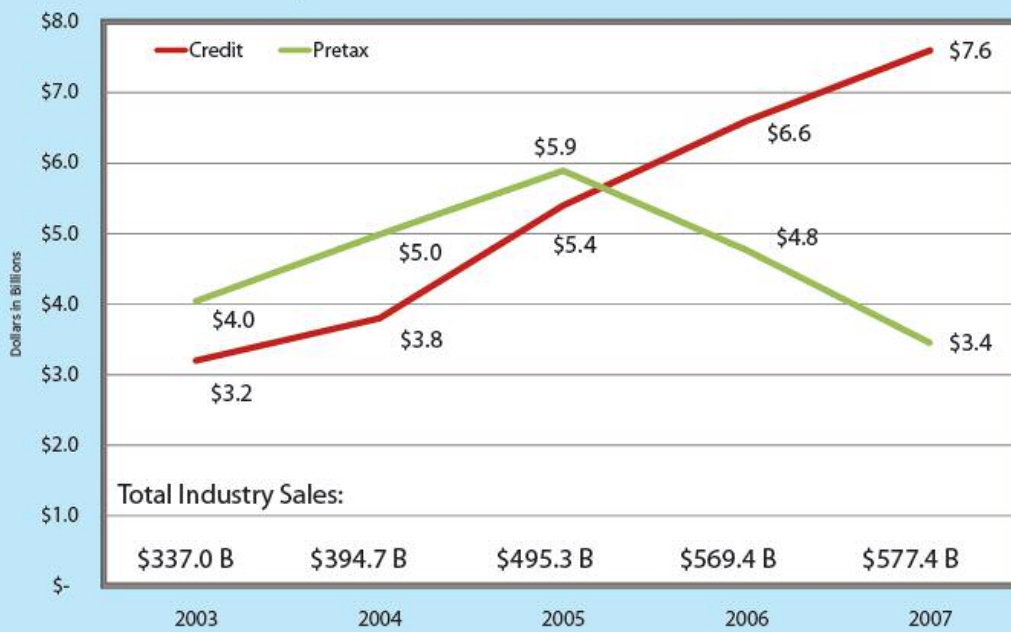
The bottom line for me is that I just want a seat at the negotiating table. If I get that, then I am willing to take my chances – just like I do in every other part of my business. If Visa and MasterCard are right in what they say about interchange, then interchange might get more expensive after this bill passes. I am happy to take that chance. Of course, if Visa and MasterCard really believed what they say, I doubt they would be fighting this hard just to avoid sitting at a balanced negotiating table.

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Members of the Committee can make their own evaluations of that – and of the other issues at stake in this debate. Regardless of the evaluations you make, I want to express to all of

you my appreciation for your willingness to seriously examine the interchange fee system. This is a problem that has remained in the shadows of secrecy for far too long and your colleagues and the public need to know about it and hear about these concerns. Thank you for giving me the opportunity to provide you with my views. I welcome your questions.

## Industry Credit Fees vs. Pretax Profit



Source: NACS