



PUBLIC INTEREST ADVOCACY CENTRE  
LE CENTRE POUR LA DÉFENSE DE L'INTÉRÊT PUBLIC

285 McLeod Street, Suite 200, Ottawa, ON K2P 1A1

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Department of Finance Canada  
Financial Sector Policy Branch  
90 Elgin St, Ottawa, ON K1A 0G5

**BY EMAIL to: [fin.payments-paiements.fin@fin.gc.ca](mailto:fin.payments-paiements.fin@fin.gc.ca)**

**Re: *Reducing Credit Card Transaction Fees - Submission of the Public Interest Advocacy Centre***

Dear Consultation Secretariat Staff,

The Public Interest Advocacy Centre (PIAC) is pleased to provide the Government of Canada with our submission on the Consultation on Reducing Credit Card Transaction Fees, which is attached.

Sincerely,

John Lawford  
Executive Director & General Counsel  
613-562-4002 ext. 125  
[jlawford@piac.ca](mailto:jlawford@piac.ca)

## Submission on the Consultation on Reducing Credit Card Transaction Fees

The Public Interest Advocacy Centre (PIAC) is providing the below comments to the Government of Canada (government) on the *Consultation on Reducing Credit Card Transaction Fees (Consultation)*.

PIAC is a non-profit charity organization that provides legal and research services on behalf of consumers interests for the provision of important public services. PIAC strives to represent the interests of ordinary and vulnerable consumers in the marketplace concerning the rates, policies, rules and regulations associated with the delivery of these services with a view to ensuring principles of access and affordability and fair treatment for consumers. PIAC has developed a strong record of consumer advocacy since its inception in 1976 and is widely recognized as an important and influential voice for ordinary consumers in a variety of marketplace issues. PIAC seeks to ensure that the public interest is served, and not neglected, by decision makers in government and the private sector when decisions are made about consumer issues.

PIAC recommends that the government develop a regulatory framework for credit card transaction fees, including interchange rates, merchant surcharging, and acquirer network and service fees that will ensure consumers are not collateral damage in the current fight between merchants and credit card companies that may very well expand to include acquirers.

### *Reducing Interchange Rates*

The government should put in place measures to ensure that consumers benefit from interchange rate reductions. Currently, merchants do no surcharge customers for credit card use and instead manage their pricing to cover the costs of interchange and other credit card transaction-related fees. Merchants have long fought to reduce interchange rates on the premise that lower fees lead to lower prices for customers and recently have begun seeing the fruits of their labour. In 2014, voluntary agreements between the government and credit card companies resulted in the average interchange rate lowering to 1.5% from 2015 to 2020, down from 1.65% for Visa and 1.74% for Mastercard.<sup>1</sup> In 2018, additional voluntary agreements resulted in the average rates being further reduced to 1.4% for both Visa and Mastercard for the subsequent five-year period.<sup>2</sup> In a perfect world, PIAC would whole-heartedly support reducing interchange fees, but in practice we have reservations.

First, we are skeptical about whether merchants, as largely profit-motivated entities, will indeed pass cost savings onto consumers. Some merchants, particularly small ones, may choose to pass on savings to consumers, either out of the need to compete in the market or as an act of pure customer appreciation,

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<sup>1</sup> CBC News, “Visa, MasterCard agree to hold interchange fees at 1.5% for 5 years” (November 2014), online: <<https://www.cbc.ca/news/business/visa-mastercard-agree-to-hold-interchange-fees-at-1-5-for-5-years-1.2822985>>.

<sup>2</sup> American Express are being excluded from PIAC’s comments because they made a separate voluntary commitment to the Finance Minister in 2018, but the government did not disclose the specific treatment of interchange rates. Department of Finance Canada, “New Agreements to Deliver Lower Credit Card Costs for Small and Medium-Sized Businesses” (August 2018), online: <<https://www.canada.ca/en/department-finance/news/2018/08/new-agreements-to-deliver-lower-credit-card-costs-for-small-and-medium-sized-businesses.html>>.

but there is no obligation for them to do so. In preparing their 2020 report on the application of Regulation (EU) 2015/751, European Commission staff stated that it is “notoriously challenging to determine pass-through rates, which is the share of interchange fees reductions which are passed on as reductions of final consumer prices.”<sup>3</sup> Despite this statement, staff went on to conclude, based in part on the self-reporting of merchants, that “competition between merchants should result in the longer run in interchange fee reductions being reflected in lower prices or improvement of services on the consumer side.”<sup>4</sup> The Government of Canada should not make the same mistake of allowing merchants to determine whether benefits are flowing to consumers and must instead build consumer input and study into the interchange fee regulatory regime. If interchange rates are to be reduced, consumers should be entitled to share in the wealth transfer to merchants.

Second, even if reducing interchange rates results in benefits flowing through merchants to consumers, consumers may still be disadvantaged by issuing banks. Issuing banks are the recipients of a significant portion of interchange fees and use these fees to, among other things, develop premium cards and reduce credit card fees.<sup>5</sup> Lowering interchange fees may decrease the profits enjoyed by issuing banks and issuing banks may seek to recoup their losses by raising annual or transactional credit card fees, reducing the value of cash-back and other rewards, and even restricting credit availability or access for people on the margin.<sup>6</sup> In its 2013 decision on credit card transaction fees, the Competition Tribunal (Tribunal) acknowledged that changes to one part of the credit card system are likely to have consequences on others.<sup>7</sup> In this decision, the Tribunal explicitly refused to grant discretionary relief despite their belief that “generally speaking even very imperfect competition is preferable to regulation” because “it [was] clear that the proper solution [...] is going to require a regulatory framework.”<sup>8</sup> PIAC urges the government to consider the Tribunal’s comments and proactively develop a regulatory regime for credit card transactions that considers the wider implications for consumers and contains mechanisms for ongoing monitoring, enforcement, and annual review that seeks and considers public input.

Merchants want to cut interchange fees because it reduces their costs and can make them more competitive and profitable. In order for consumers to share in the benefits of reduced interchange fees, the flow-through value from merchants must outweigh the likely negative consequences imposed by issuing banks. The government has listed “protecting existing rewards points of consumers” as a Consultation objective. We look forward to more details on how this aim will be realized and bring to

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<sup>3</sup> European Commission “Commission Staff Working Document: Report on the application of Regulation (EU) 2015/751 on interchange fees for card based payment transactions” (June 2020), online: <<https://ec.europa.eu/competition/publications/reports/kd0120161enn.pdf>>.

<sup>4</sup> *Ibid.*

<sup>5</sup> While credit card companies set interchange fees, issuing banks dictate interest rates, annual fees, late fees, foreign transaction fees, and over-limit fees and, together with their co-brand partners, set rewards such as points and cashback. Source: Brendan Harkness “Credit Card Issuers vs. Networks — What’s the Difference?” (August 2021), online: <<https://www.creditcardinsider.com/learn/issuers-networks/#:~:text=cash%2Daccepting%20ATMs,-,What's%20a%20Credit%20Card%20Issuer%3F,that%20backs%20the%20card%20financially>>.

<sup>6</sup> Consumers Council of Canada, *Stuck in the Middle: Consumers, Transaction Fees and Loyalty Programs* (2015) at 29, online: <[https://www.consumerscouncil.com/wp-content/uploads/sites/19/2020/03/ccc\\_806321\\_loyalty.pdf](https://www.consumerscouncil.com/wp-content/uploads/sites/19/2020/03/ccc_806321_loyalty.pdf)>.

<sup>7</sup> *The Commissioner of Competition v. Visa Canada Corporation and MasterCard International Incorporated*, 2013 Comp. Trib. 10 at para 394, online: <<https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/463271/1/document.do>> [Competition Tribunal Decision].

<sup>8</sup> *Ibid.*

the Consultation Staff's attention PIAC's report *Customer Loyalty Programs: Are Rules Needed?*.<sup>9</sup> PIAC believes it is time for the government to consider a more fulsome approach to interchange rate reductions that addresses the precarious position of consumers.

### *Restricting Merchant Surcharging and Discrimination*

Merchant surcharging, despite being a likely source of significant strife, is absent from the Consultation. PIAC recommends that any regulatory framework for interchange fees also include regulating merchant surcharge fees. The activities of credit card companies have been highly scrutinized throughout the years of lobbying for reduced interchange rates, but merchants may be just as ill-suited to dictate credit card transaction fees. For instance, if surcharging becomes permitted, merchants may be susceptible to excessive surcharging, especially where: consumers are most likely pay with a credit card either because a deposit is required, for example when booking a hotel or rental car; the purchase is expensive; or no meaningfully competitive alternatives exist in the market. As an example, when Australia removed its no-surcharging rule in 2003, it saw merchants, notably airlines, excessively surcharging consumers. In 2016, the Reserve Bank of Australia reviewed the Card Payments Regulation and found that airlines were surcharging customers a flat rate of \$7-8 per booking for both expensive, cross-country, roundtrip, business class tickets and low value domestic flights, which at the time were sometimes as low as \$39.<sup>10</sup> One analysis of airline credit surcharges found sample surcharges that were between 348% and 1187% higher than the actual cost of processing the credit card payments.<sup>11</sup> In addition to the risk of excessive surcharging, merchants may also behave irresponsibly if the "honour-all-cards" rule is removed. Without this rule, merchants may make it more difficult for consumers to use specific credit cards – standard or premium cards – by either refusing to accept them or surcharging consumers more to use them. This discrimination between cards can result in consumers wasting time and energy trying to determine which merchants will accept their credit card and how much they will be charged to use it, or opting out of credit card use altogether. The benefits a consumer had hoped to gain from a specific credit card, which they initially deemed worth, for example, a higher annual fee, may be negated. As with interchange fees, setting and altering surcharge fees can have significant implications which cannot be addressed by mere competition. Indeed, the 2013 Competition Tribunal decision mentioned above specifically noted: "the experience in other jurisdictions such as Australia and the United Kingdom shows that concerns will be raised by consumers regarding surcharging and possible gouging, and rather sooner than later, intervention will have to take place by way of regulation."<sup>12</sup>

If the government does not develop a regime, either prohibiting surcharging or regulating it, then the for-profit players will move forward with implementing a regime that suits their interests. In 2011, merchants launched class action lawsuits in British Columbia, Alberta, Saskatchewan, Quebec, and Ontario alleging Visa and Mastercard conspired with their issuing banks and acquirers to set interchange fees and impose rules – the "no surcharge rule" and "honour-all-cards" rules – to force merchants to

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<sup>9</sup> Public Interest Advocacy Centre, *Customer Loyalty Programs: Are Rules Needed?* (November 2013), online: <[https://www.piac.ca/wp-content/uploads/2014/11/customer\\_loyalty\\_programs\\_are\\_rules\\_needed\\_1.pdf](https://www.piac.ca/wp-content/uploads/2014/11/customer_loyalty_programs_are_rules_needed_1.pdf)>.

<sup>10</sup> Point Hacks, "What the RBA's credit cards payment regulations mean for frequent flyer point collectors" (May 2016), online: <<https://www.pointhacks.com.au/rba-interchange-decision-analysis-201605/>>.

<sup>11</sup> Kate Browne, "Credit card surcharge crackdown" (February 2016), online: <<https://www.choice.com.au/money/credit-cards-and-loans/credit-cards/articles/credit-card-surcharge-crackdown>>.

<sup>12</sup> Competition Tribunal Decision, *supra* note 7 at para 395.

bear the cost of higher rates.<sup>13</sup> Visa, MasterCard, and their issuing banks all denied liability, but reached settlements with the class of merchants in 2017.<sup>14</sup> As part of the settlements, Visa and Mastercard agreed to drop their contractual restrictions on surcharging thereby allowing merchants and suppliers to surcharge consumers up to a cap. The cap settled on is the lesser of 2.5% or 1% plus the interchange rate set out in any voluntary agreement, expressed as a percentage of a transaction.<sup>15</sup> The settlement agreement states that if the interchange rate is higher than 1.5% (the rate in place at the drafting of the agreement) then the maximum cap of 2.5% will be increased by an equivalent percentage, thus raising the possibility of higher surcharging fees in future. The Visa and Mastercard settlement agreements were approved by the final of the five courts on November 13, 2018 and can now be implemented at any time, although we assume, based on the absence of a “maximum surcharge cap” publication on their websites, that Visa and Mastercard have not yet implemented these agreements.<sup>16</sup> Once established, the cap will be in place for a period of at least five years, at which point a reinstatement of surcharging restrictions will be possible, but will negate the release of liability and likely lead to further law suits.<sup>17</sup> In essence, interchange rates and merchant surcharge rates will be set and renegotiated every five years by a handful of merchants and credit card companies without input from other stakeholders or consumers. A five year review has the potential to saddle consumers, merchants, and credit card companies with interchange and surcharge rates that are unresponsive to rapidly changing markets.

PIAC is not suggesting that the government’s forthcoming regime must retain the “no-surcharge” and “honour-all-cards” rules. We acknowledge that there are some benefits to allowing surcharging and card discrimination. For example, consumers who do not use premium cards – by choice or by necessity – will, if surcharging is implemented correctly and product prices are lowered, no longer share the burden of paying for the higher interchange rates applied to support premium cards. However, the government cannot ignore the possibility of merchants acting selfishly nor rely on opposition from credit card companies to keep merchants in check, especially in industries with little competition. If the government intends to allow merchants to surcharge customers or discriminate between cards, PIAC recommends that they implement these changes gradually to ensure consumers are able to reap the intended benefits of their credit card selection and, if need be, transfer to a card that better suits their needs under the new regime. A smooth transition to a regulatory model will require the government and relevant corporate entities to act transparently.

In developing a credit card transaction fee regime, the government may look to other jurisdictions for regulatory inspiration. For example, after the 2016 review of its Card Payments Regulation, Australia

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<sup>13</sup> Credit Card Settlements, “Frequently Asked Questions” (2018), online:  
<<https://www.creditcardsettlements.ca/en/Home/FAQ>>.

<sup>14</sup> *Coburn and Watson’s Metropolitan Home v. BMO Financial Group*, 2018 BCSC 1183 at para 15 [*Coburn*].

<sup>15</sup> Credit Card Settlements, “Canadian Credit Card Fees Class Action National Settlement Agreement (Visa)” (June 2017), online:  
<<https://www.creditcardsettlements.ca/Content/Documents/Visa%20Settlement%20Agreement.pdf>>.

Credit Card Settlements, “Canadian Credit Card Fees Class Action National Settlement Agreement (Mastercard)” (June 2017), online:  
<<https://www.creditcardsettlements.ca/Content/Documents/Mastercard%20Settlement%20Agreement.pdf>>.

<sup>16</sup> *Ibid.* “Visa [and Mastercard] shall publish the “maximum surcharge cap” on the portion of its website and its rules that sets forth merchants’ surcharging rights and obligations.”

<sup>17</sup> *Coburn, supra* note 13 at para 38.

established a consumer protection regime that bans surcharging in excess of the cost of the transaction and gives the Australian Competition and Consumer Commission the power to investigate excessive surcharging complaints, issue infringement notices, and seek monetary penalties.<sup>18</sup> PIAC encourages the government to create a similar avenue for Canadian consumers to provide feedback on whether merchants are improperly surcharging and more generally on how surcharging is impacting their spending habits.

### *Regulating Acquirer Fees*

Merchants and credit card companies have settled on an interchange and surcharging rates system that works for them, but acquirers are not explicitly covered by this arrangement. There are at least two other fees, the acquirer network fee and acquirer service fee, that issuing banks charge to acquirers via credit card companies and that acquirers subsequently charge to merchants.<sup>19</sup> These fees, together with the interchange fee, are often charged as a blended rate, but can also be charged separately.<sup>20</sup> These fees need to be captured by a regulatory framework in order to provide clarity on whether these fees are to be included in the interchange rate cap or a surcharge cap or subject to their own restrictions. The government needs to ensure that merchants are not able to surcharge consumers for these rates without justification or limit. PIAC encourages the government to develop a list of appropriate fees that can be included in interchange and surcharge rates and transparency requirements that ensure merchants are not hiding non-transaction-related costs in their charges to consumers.

### *Conclusion*

PIAC believes the government should develop a framework for credit card spending that regulates all four institutional players: issuers, merchants, acquirers, and credit card networks and their corresponding fees.<sup>21</sup> If the government coordinates how each of these players contributes to and pays for transaction costs then there is greater potential for frictionless pricing that results in neutral effects for consumers.<sup>22</sup> We recommend that any set rates – interchange, surcharge, or acquirer – be subject to regular review ideally carried out by a regulatory board, which will collect evidence from stakeholders and base its decision on explicitly stated factors. We ask that the government ensure consumers are able to report misconduct through free and easy-to-use complaint mechanisms. Most importantly, PIAC recommends that the government take steps towards proactive regulation rather than allow voluntary agreements and settlement agreements negotiated behind closed doors to dictate the parameters of the credit card transactional rates regime.

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<sup>18</sup> Australian Competition and Consumer Commission, “Ban on excessive payment surcharging” (May 2016), online: < <https://www.accc.gov.au/update/ban-on-excessive-payment-surcharging>>.

<sup>19</sup> Competition Tribunal Decision, *supra* note 7 at para 29.

<sup>20</sup> *Ibid.* at para 32.

<sup>21</sup> *Ibid.* at para 9.

<sup>22</sup> Alan S. Frankel and Allan L. Shampine, “The Economic Effects of Interchange Fees” (2006) 73:3 Antitrust Law J 627.