Senator Dick Durbin
Chair, Senate Judiciary Committee
Written Questions
Hearing on "Excessive Swipe Fees and Barriers to Competition in the Credit and Debit Card Systems"
May 11, 2022

Questions for Doug Kantor, General Counsel, National Association of Convenience Stores

1. Mr. Sheedy of Visa and Ms. Kirkpatrick of Mastercard indicated that swipe fees were helpful in moving the credit and debit card systems toward greater security, including toward the use of tokenization technology.

   a. **Do you agree? Please explain.**

Unfortunately, the opposite is true. The lack of competition in the credit and debit card markets has decreased the incentives for the card networks to innovate and invest in security.

Debit reform, for example, increased security protections. By prohibiting exclusivity arrangements so that more than one network had to be available to handle debit card transactions, the market changed so that networks needed to find a way to improve their offerings. One way they did that was with enhanced protections against fraud. As soon as the debit reforms came into effect, the networks started introducing full end-to-end encryption of data.[1] They also accelerated the transition to chip cards in the United States.[2]

The credit card industry sometimes argues that high swipe fees are needed to cover fraud costs, but this is not the case – as is clear from the fact that fraud is much lower in nations with much lower swipe fee rates. Economists with the Federal Reserve Bank of Kansas City have found that fraud costs are not a justification for over-inflated interchange fees. They wrote, "Card organizations have often argued that the reason why they impose proportional fees stems from the cost they bear from their 'payment guarantee' service which insures merchants against customers who pay with cards without having sufficient funds. We argue that the cost of fraud and insufficient funding is negligible compared with fees at the range of 1% to 3% commonly imposed by brand name cards. For example, industry studies show that the average net fraud

[1] *See*, e.g., Tracy Kitten, "Visa's New End-to-End Encryption Service," Bankinfo Security (Sept. 12, 2012) available at https://www.bankinfosecurity.com/interviews/visas-new-end-to-end-encryption-service-i-1650.

[2] *See* Visa presentation to Federal Reserve (Jan. 8, 2014) at 2, available at http://www.federalreserve.gov/newsevents/rr-commpublic/visa-meeting-20140108.pdf.

losses are around 0.05% for signature debit cards, which do not extend credit to card users."[3] And, as noted above, the majority of fraud is paid by merchants, not banks.

The swipe fee system on debit cards prior to reforms created disincentives to the card industry taking fraud protection more seriously. Because the fees were much higher than losses from fraud, financial institutions were not highly motivated to make changes to cut down that fraud. A June 2011 Consumer Reports article pointed out these problems. It noted that thieves could "easily and cheaply" copy U.S. debit card data that is usually stored unencrypted in a magnetic stripe on the back of the card. According to the article, "The U.S. and some non-industrialized countries in Africa are among the only nations still relying on magstripe payment cards, which came into wide use in the 1970's."[4]

A representative from the New York Police Department explained in the Consumer Reports piece that the NYPD had "recommended to several of the large financial institutions that the biggest deterrent to skimming would be using the kind of cards that are issued in Europe and Canada with a chip that makes them pretty much impossible to skim."[5] The article noted that financial institutions had been reluctant to do that due to their large card revenues. After debit reform, however, the card industry had newfound motivation to reduce fraud and pushed the transition to chip cards – though, unfortunately, they failed to push PIN usage as they had in other parts of the world.

Of course, fraud problems still persist and the large fees charged to merchants when cards are used make those problems worse. A recent investigative report indicated that both Visa and Mastercard are aware of significant fraud with payment cards and take little to no action to stop it.[6] The report detailed extensive fraud problems and indicated that because of the networks' interest in collecting high fees on a per transaction basis they were not as motivated as they should be to make efforts to reduce that fraud.

b. I am concerned that network-imposed requirements to use Visa and Mastercard proprietary tokenization technology may serve as a barrier to competition and security innovation. Do you agree? Please explain.

Yes, proprietary tokenization requirements are among the most recent actions taken by Visa and Mastercard that inhibit merchants' ability to choose an alternative debit network to handle their transactions. Visa and Mastercard do not allow many alternative networks to detokenize these transactions which increases the risk of transactions being denied. It also means that when these smaller competitor networks receive tokenized transactions, they must request

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[3] Oz Shy and Zhu Wang, "Why Do Card Issuers Charge Proportional Fees?" The Federal Reserve Bank of Kansas City Economic Research Department, (December 2008) at 3 available at https://www.kansascityfed.org/documents/5325/pdf-rwp08-13.pdf.

[4] "House of cards: Why your accounts are vulnerable to thieves," Consumer Reports Magazine (June 2011).

[5] *Id*.

[6] Rosalind Adams and Tom Warren, "Two-Card Monte: Why Mastercard and Visa Rarely Shut Down Scammers Who are Ripping Off Consumers," Buzzfeed News (May 18, 2022) available at https://www.buzzfeednews.com/article/rosalindadams/mastercard-visa-fraud.

detokenization from Visa or Mastercard – and Visa and Mastercard then have visibility into the data regarding the business that is going to their competitors. So, tokenization becomes a tool to increase Visa's and Mastercard's favored position in the marketplace.

It appears that Visa and Mastercard are working with one or more web browser companies to use their proprietary tokenization technology to push it into more transactions and create greater advantages for these two dominant networks.[7] The combination of dominant card networks working with dominant web browsers to disadvantage smaller network competitors is a worrisome sign for the market.

2. Mr. Sheedy testified that credit card swipe fees have remained level since 2015. **Is that what merchants have experienced?**

No, that is not accurate. The average swipe fee paid by retailers on Visa and Mastercard credit cards has risen by 9 basis points since 2015. The raw dollar increases on those transactions are even more staggering and tell the larger story. Swipe fees paid on Visa and Mastercard credit cards have increased more than $34 billion since 2015 – from $43 billion to $77 billion.[8] That is an increase of 79 percent in just six years.

Merchants certainly don't view paying an additional $34 billion as "level."

3. There was discussion during the hearing about swipe fees creating a level playing field for banks. You indicated that that was not the case in part due to the higher per transaction costs incurred by smaller banks in handling payment card transactions. **Are there other ways in which you think the current system does or does not create a level playing field for financial institutions?**

Currently, the way that credit card swipe fees are fixed disadvantages small banks and credit unions. Those institutions typically have higher costs than do large institutions (which, unlike small banks, often pay nothing to the credit card networks). Credit union representative John Blum, for example, testified on behalf of the National Association of Federal Credit Unions in 2010 and told the House Judiciary Committee: "Credit unions have a higher per-transaction cost for processing card payments."[9] Community banks have similar disadvantages because of their relatively small size resulting, in many instances, in the need to outsource card operations.[10] By fixing fees for all banks at the same level, however, large banks have for years been guaranteed higher profit margins than their smaller competitors. Those large banks have used their advantage to aggressively market themselves to consumers. That is one of the reasons why the credit card market is more concentrated than the debit card market. Many consumers who

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[7] See https://9to5google.com/2022/05/11/google-chrome-virtual-cards/.
[8] See Nilson Report (March 2022) available at Nilson Report | News and Statistics for Card and Mobile Payment Executives.
[9] John Blum, Hearing before the Task Force on Competition Policy and Antitrust Laws, House Judiciary Committee, May 15, 2008, House Report No. 110-179, at 80.
[10] Dave Carpenter, Hearing before the House Judiciary Committee on the Credit Card Fair Fee Act of 2009, Apr. 28, 2010.

have accounts and debit cards at small banks and credit unions receive credit card and other offers from large banks. The large banks take the small banks' customers in this way on a regular basis – paid for by their excess interchange earnings. The result is that large banks have a bigger share of both the credit and debit card markets than their share of deposits.[11]

Debit reforms have helped to level the playing field. The Philadelphia Federal Reserve published a study on the impact of debit reform on small financial institutions in February 2016. The study found that after reform, "the volume of transactions conducted with cards issued by exempt banks *grew faster* than it did for large banks."[12] The study concluded that "the evidence does not support the claim that competitive forces have effectively imposed the interchange fee ceiling on small banks."[13]

The Credit Union Times has reported that debit reform created "a powerful way for credit unions to accumulate market share" and "what some say is a huge opportunity for credit unions."[14] According to Texas Trust President and CEO Jim Minge, debit reforms created "…a huge opportunity for credit unions like the Mansfield, Texas Trust Credit Union and everybody else below the $10 billion threshold…" Debit swipe fee reform "applies only to financial institutions with more than $10 billion in assets, which has created a huge opportunity for credit unions – especially those that want to attract millennials."[15]

Centralized price-setting of credit card swipe fees harms smaller financial institutions. More competition in the market would help give them additional levers to try to compete with the largest banks including by allowing them to negotiate among the different networks.[16]

4. At the hearing, there was discussion about the extent to which interchange fees are used to cover fraud losses.

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[11] *See* Adam J. Levitin, *Interchange Regulation: Implications for Credit Unions*, 2010, at 39 (noting that 10 banks alone account for almost 90 percent of the credit card market and 51 percent of the debit card market, even though those 10 banks hold only 36 percent of insured deposits), *available at* http://www.federalreserve.gov/newsevents/files/levitin_filene_paper.pdf.

[12] James Disalvo and Ryan Johnston, "How Dodd-Frank Affects Small Bank Costs," Economic Insights: Federal Reserve Bank of Philadelphia (Feb. 2016) available at https://www.philadelphiafed.org/-/media/frbp/assets/economy/articles/economic-insights/2016/q1/eiq116.pdf.

[13] *Id*.

[14] "Credit Unions Revive Debit Rewards" (Jan. 22, 2016) available at http://www.cutimes.com/2016/01/22/credit-unions-revive-debit-rewards; "Credit Unions Pile Into Debit Rewards" (Jan. 20, 2016) available at http://www.cutimes.com/2016/01/20/credit-unions-pile-into-debit-rewards?page=1&slreturn=1453333652.

[15] "6 Winning Credit Union Payments Strategies" (Apr. 15, 2016) available at http://www.cutimes.com/2016/04/15/6-winning-credit-union-payments-strategies?slreturn=1487974414&page=2.

[16] The two largest networks favor larger financial institutions in the terms of their deals. *See* "2019 Interchange Fee Revenue, Covered Issuer Costs, and Covered Issuer and Merchant Fraud Losses Related to Debit Card Transactions," Board of Governors of the Federal Reserve System (May 2021) at 15, available at https://www.federalreserve.gov/paymentsystems/files/debitfees_costs_2019.pdf.

a. Please explain how fraud losses are allocated within the credit and debit card systems.

While the card industry often talks about a "payment guarantee," merchants are not guaranteed payment on credit or debit card transactions. In fact, merchants are forced to absorb the majority of the cost of fraudulent card transactions. When the merchant is forced to pay for the fraud, this is called a "chargeback." It means that the money the merchant was supposed to receive on the transaction is taken away (in other words, charged back). This can happen to a merchant without notice even months after the transaction takes place.

Visa and Mastercard adjudicate whether the merchant or the bank that issued the card must pay for the fraud on any given transaction. The two networks do that knowing that they are not going to pay the costs of the fraud. This can lead to questionable incentives for the networks – particularly because the major banks own restricted stock in the two networks and the networks are dependent on those two banks to issue cards. The deck is stacked against merchants.

The Federal Reserve has collected data on debit card fraud every two years since debit reform was passed. Its 2019 data shows that merchants covered 56.3 percent of debit card fraud while card issuing banks only covered 35.4 percent (and consumers covered the remaining 8 percent).[17] The picture is similar for credit cards as merchants absorb most fraud losses – particularly since Visa and Mastercard implemented a liability shift to push chip card usage which pushed a significant share of fraud onto merchants. In fact, the Federal Reserve has reported that the merchant share of fraud on dual message debit cards (processed in similar fashion to credit cards) is more than 60 percent.[18]

b. In what ways are merchants held responsible for fraud losses?

All of the fraud chargebacks merchants must pay are on top of the swipe fees they pay. Those swipe fees amount to a prepayment of all fraud charges (and much more) to card-issuing banks. Merchants should not have to prepay for fraud and they should not have to pay when the fraud happens in addition to prepaying for it. They also shouldn't have to hear about the great "payment guarantee" they receive on credit and debit cards when the merchants pay for fraud multiple times.

It is worth noting that even with debit reform, merchants prepay all the fraud that banks otherwise cover. Federal Reserve Regulation II, which implements debit reform, includes 5 basis points as part of the regulated debit swipe fee to cover fraud losses by banks. That number was

[17] "2019 Interchange Fee Revenue, Covered Issuer Costs, and Covered Issuer and Merchant Fraud Losses Related to Debit Card Transactions," Board of Governors of the Federal Reserve System (May 2021) at 4, available at https://www.federalreserve.gov/paymentsystems/files/debitfees_costs_2019.pdf.
[18] *Id*.

pegged to 100 percent of the fraud losses on debit cards paid by the average bank covered by the regulation. Of course, that means that fraud is a guaranteed profit center for many of the banks covered by the regulation (those with below average fraud losses). And, the vast majority of banks across the nation are not subject to the Fed's fee regulation. They charge even higher fees that exceed their fraud losses on debit cards. Why merchants must pay chargebacks to cover the majority of fraud that they have already prepaid (and then some) to the banks is inexplicable.

Because merchants pay for fraud at least twice, banks do not have the full economic incentives to do their part to reduce fraud. The situation is even worse for networks because, as noted above, they are not responsible for fraud losses on credit and debit cards. There should be greater alignment of incentives by increasing competition in the marketplace so that margins earned by banks come back toward reality and they have more reason to cut back on fraud. As noted, competition would also spur networks to compete on fraud prevention and innovate in this area.

Ultimately, of course, American consumers pay more when fraud costs are too high. The system needs to change so that those costs get reduced for everyone's benefit.

Questions for Doug Kantor

1) I have heard competing views on whether changes to interchange fees are beneficial for the consumer. Some argue that the consumer benefits through lower prices at the store while others say that the consumer benefits through free checking or rewards through their cards. What is your view on how any changes to interchange fees could benefit the consumer?

There is no question that lower swipe fees would benefit consumers. Consumers ultimately pay when retailers have higher costs. That is true when those costs come from higher wholesale or other costs just like it is true when those costs come from swipe fees. Subjecting those costs to competitive market pressures benefits everyone. The only way that cost savings would not be passed on to consumers would be if there was a market failure and lack of competition in U.S. retail markets. There is no such failure. American retail is very competitive on price, quality and service. The idea that retailers with average profit margins of 2.65 percent would be able to keep cost savings rather than keeping those margins narrow defies economic reality and is contrary to how competitive markets work.

Debit reform demonstrates that consumers benefit from lower swipe fees. Those reforms were enacted in 2010 and took effect in 2011. They have been helpful in curtailing debit swipe fee rates and providing competition among networks.[1] One report showed that debit reform saved consumers $5.86 billion in 2012 alone - the first year the reforms were in effect.[2] That was nearly 70 percent of the overall savings from debit reform that year with merchants saving an additional $2.64 billion.[3] Collectively, these savings supported more than 37,000 jobs[4] – a significant economic stimulus.

In addition, *Moody's Investor Service* has reported that debit reform savings have shielded consumers from higher prices that would have resulted from increases in other operating costs for businesses such as transportation and fuel costs. The report says, "As merchant acquirers pass on debit fee savings to retailers, we believe retailers will use them to help shield customers from the impact of these other rising costs."[5] The report also noted, "While on the surface it would be easy to presume that retailers would benefit from a reduced debit interchange fee, we do not expect retailers to see a material improvement in their earnings due to the Durbin Amendment."

The Moody's report is supported by analysis of how pricing moved following the implementation of debit reform. The data shows that there was inflation in the U.S. economy in the years after debit reform was implemented. Cost increases, as reflected in the Producer Price

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[1] While reform has been beneficial, the rates paid by merchants remain higher than they should be. Costs have declined over the past decade and the rates are not proportional to costs.

[2] Robert Shapiro, "The Costs and Benefits of Half a Loaf: The Economic Effects of Recent Regulation of Debit Card Interchange Fees," (Oct. 2013) available here.

[3] *Id*. at

[4] *Id*. at

[5] "New Debit Rules Hurt Banks and Reshape the Payment Processor Market," Moody's Investor Service (June 20, 2012) at 10.

Index for retail trade industries, rose 9.4 percent from the time reform went into effect in October 2011 through the end of 2016, while price increases to consumers, reflected in the Consumer Price Index, increased only 4.3 percent.[6] That is a large spread between the higher costs that merchants had to pay for the goods they sold and the prices that they charged consumers. Those numbers demonstrate clearly that merchants shielded their customers from the majority of the cost increases the merchants themselves faced. And, that experience has held true even during the past year with increased inflation. During 2021, the Producer Price Index rose by 9.7 percent while the Consumer Price Index rose by 7 percent.[7]

Retail profit margins show the same pattern. Those margins did not grow following debit reform. In fact, in the grocery industry, pretax profit margins in the two years prior to debit reform were 2.3 percent – and following debit reform those margins fell to 2.1 percent (in 2012) and 1.9 percent (in 2013).[8]

This data reconfirms the intensely competitive nature of U.S. retail. It is very clear that savings from debit reform (and more) have been consistently passed along from merchants to consumers in the form of prices that are significantly lower than what consumers would have been forced to pay in the absence of those reforms.

Anyone who believes free markets work would need to recognize that cost savings to retail businesses help hold down prices to consumers – unless they believe that there is a market failure in the retail sector of the economy. Of course, there is not. Retail is one of the most competitive sectors of the U.S. economy and has been for decades. Without a market failure, there is no question that reduced costs pass-through into lower prices. By arguing otherwise, it makes it sound as though the credit card industry has lived with centralized price-setting so long that they have forgotten how real competitive markets work.

The credit card industry likes to point to a report released by the Richmond Federal Reserve to try to disprove consumers' clear benefits from debit reform. The problem is that, in talking about that report, they never mention the cautionary notes that the study's authors themselves included in the report – which make clear it should not be used to prove the point for which the credit card industry tried to use it. First, the report made clear they did not look at actual costs and prices - it was just an opinion survey.[9] Second, the survey sample was small and could have been biased by getting responses primarily from those dissatisfied with the way the Fed wrote its regulation. Finally, it is worth noting what may be obvious given today's economic environment. Inflation is always present and matters. The actual data shows that merchants held

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[6] Producer price index figures from the St. Louis Fed can be found here: https://fred.stlouisfed.org/series/PCUARETTRARETTR and consumer price index figures from the Minneapolis Fed can be found here: https://www.minneapolisfed.org/community/teaching-aids/cpi-calculator-information/consumer-price-index-and-inflation-rates-1913.

[7] The U.S. Bureau of Labor Statistics' release on the producer price index can be found here: Producer Price Index News Release summary - 2021 M12 Results (bls.gov) and the 2021 increase in the consumer price index can be found here: CPI Home : U.S. Bureau of Labor Statistics (bls.gov).

[8] "Grocery Store Chains Net Profit," FMI available at FMI | Grocery Store Chains Net Profit.

[9] Renee Haltom and Zhu Wang, "Did the Durbin Amendment Reduce Merchant Costs?" (Dec. 2015) at 4, available here.

prices down as their costs increased. That is real consumer savings. But a survey that asks whether prices were reduced would not get that information.

In addition, the idea that consumers were harmed by reform are simply wrong. The offers that banks provide consumers on things like checking accounts have their own market dynamics and primarily turn on the interest rate environment at a given time. Debit regulation does not determine what banks do pricing checking.

While the credit card industry like to claim that consumers had fewer options for free checking accounts following debit reform, their claims are demonstrably wrong. At the outset, it should be noted that the banking industry has admitted that "free" checking is a fallacy, "Customers never had free checking accounts. They always paid for it in other ways, sometimes with penalty fees."[10]

In addition to Bank of America's doubts about free checking ever having existed, it should be noted that the banking industry rapidly got rid of many free checking account offerings in the years *before* debit reform ever took effect. First, the banking industry blamed the financial crisis as the reason why they had to take away free checking and charge consumers higher fees.[11] Then, the industry pivoted and started blaming overdraft regulations for their decisions to increase checking account fees.[12] In fact, some even had the temerity to suggest that they had to

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[10] Bank of America spokeswoman, Anne Pace, quoted in "Bank Accounts: Free Checking Fading Fast," The Christian Science Monitor (Oct. 19, 2010), available at http://www.csmonitor.com/Business/Latest-News-Wires/2010/1019/Bank-accounts-Free-checking-fading-fast

[11] *Rising Bank Fees are Setting Records,* USA Today (Oct. 27, 2008), available at http://www.usatoday.com/money/industries/banking/2008-10-26-atms-fees-checks-banks_N.htm ("The high fees come at a time when banks are struggling to unload bad mortgage loans."); *Banks Boost Customer Fees to Record Highs,* Wall Street Journal (Nov. 12, 2008), available at http://online.wsj.com/article/SB122645109077719219.html ("Banks are responding to the troubled economy by jacking up fees on their checking accounts to record amounts."); *Banks Find Ways to Boost Fees; Checking Accounts Latest Target,* USA Today (May 28, 2009), available at http://www.usatoday.com/money/industries/banking/2009-05-27-checks-fees-banks_N.htm ("Banks defend their policies, saying that as unemployment rises, consumers have become riskier, and the higher fees reflect that risk. Banks may also be raising some account fees to compensate for higher borrowing costs and to keep prices in line with other financial institutions, says Scott Talbott of the Financial Services Roundtable, which represents the nation's largest banks."); *Bank Fees Rise as Lenders Try to Offset Losses*, New York Times (July 2, 2009), available at http://www.nytimes.com/2009/07/02/business/02fees.html?_r=1 ("Scott E. Talbott, a lobbyist for the Financial Services Roundtable, said that the banks' fees reflect the cost of providing those services and the rise in overdraft charges reflects increased risk. 'There is an increased riskiness around repayment because of the recession, he added.'").

[12] *Is Free Checking on its Way Out?* CNNMoney.com (July 2, 2009), available at http://moremoney.blogs.money.cnn.com/2009/07/02/is-free-checking-on-its-way-out/ ("Bank customers used to the perks of free checking accounts -- unlimited check writing, online banking, debit card use and ATM access, to name a few -- might have to recalibrate their expectations soon. That's because overdraft fees, which banks use to subsidize the expense of free checking accounts, have been under fire by consumer advocacy groups."); *Banking Expert: Free Checking Accounts aren't Long for this World,* WalletPop.com (Aug. 31, 2009), available at http://www.walletpop.com/2009/08/31/banking-expert-free-checking-accounts-arent-long-for-this-worl/ (Following the Credit Card Accountability Responsibility and Disclosure Act and overdraft regulations, "banks are already trying to think of new ways to make their profits."); *Banks' Struggle May Mean End of Free Checking,*

increase checking fees because they couldn't make the same money from risky mortgages anymore.[13]

All of these various excuses for the steep drop in free checking offerings were made long before debit reform came into being. The litany of excuses was summed up well in a 2011 article written when banks were blaming debit reform for their increases in checking fees – remarkably, doing this even before debit reform had ever taken effect – "The pattern is getting old and weary. Banks will raise checking fees whenever and wherever they think they can get away with it. And they will blame any convenient development for their choices."[14]

This background matters because the credit card industry typically relies on two fatally flawed studies to try to show that reductions in free checking that came before debit reform – reductions they blamed on the financial crisis and limits on overdraft fees – were actually caused by debit reform. These studies take January 2009 as the measuring point for free checking prior to debit reform even though those reforms did not come into effect until October 2011, nearly two full years later. And, they pushed these studies onto the Government Accountability Office which cited them in a recent report without recognizing that the timing of the studies meant that the studies were blaming debit reform for things that happened prior to reform coming into effect.[15]

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msnbc.com (Nov. 10, 2009), available at http://www.msnbc.msn.com/id/33840681/ns/business-consumer_news/ ("The change by Citi comes as Congress considers legislation that would limit banks' ability to levy overdraft fees on checking accounts."); *The End of Free Checking?* MoneyTalksNews.com (Dec. 30, 2009), available at http://www.moneytalksnews.com/2009/12/30/the-end-of-free-checking/ ("[N]ew Congressional regulations like the CARD Act have limited the amount of money banks can make from credit cards. The Federal Reserve also has plans to address the highly lucrative "overdraft fee industry", estimated to be worth $38.5 billion in 2009 by industry consultants Moebs Services. In other words, free checking accounts may soon be going the way of the dinosaur."); *The End of Free Checking,* NPR Planet Money (June 17, 2010), available at http://www.npr.org/blogs/money/2010/06/17/127899418/you-may-have-to-pay-for-that-checking-account ("It costs banks a few hundred bucks a year to maintain a customer's checking account. Banks have been able to make that up (and more) largely by charging overdraft fees. But new federal rules mean banks can only charge those fees to customers who sign up for overdraft protection."); *The End of Free Checking,* The Atlantic (June 21, 2010), available at http://www.theatlantic.com/business/archive/2010/06/the-end-of-free-checking/58444/ ("Free checking is on life support. . . . The main reason why, of course, is the imminent prohibition of overdraft fees, which had been a boon for banks."); *End of Free Checking a Financial Squeeze: How Employers Can Help*, The Huffington Post (June 28, 2010), available at http://www.huffingtonpost.com/clare-j-morgan/end-of-free-checking-a-fi_b_627540.html ("The free checking accounts many Americans enjoy will soon be a thing of the past as banks scramble to find new ways to recoup overdraft charges and other fees they're no longer allowed to impose.").

[13] *The End of Free Checking? Not at Credit Unions!* Credit Unions Online (June 17, 2010), available at http://www.creditunionsonline.com/news/2010/The-End-of-Free-Checking-Not-at-Credit-Unions.html ("Since banks can no longer charge many credit card fees of the past and high risk (high fee) mortgages are gone, banks are finding themselves short of revenue. . . . Now the banks are coming after your checking account to make up the difference.")

[14] David Balto "The Bankers' New Goat," HuffPost (May 25, 2011) available at https://www.huffpost.com/entry/the-bankers-new-goat_b_834615.

[15] *See* "Banking Services," Government Accountability Office (Feb. 2022) available at https://www.gao.gov/assets/gao-22-104468.pdf.

The number of checking accounts without monthly fees fell by 11 percentage points just from 2009 to 2010 – still a year before debit reform.[16] But, by counting the remarkably swift and steep reduction in the number of free checking accounts that occurred during the financial crisis and blaming that on debit reform (which came later), these studies deceptively pronounce that debit reform reduced free checking. It didn't.

Banking industry data demonstrates that free checking increased from the time debit reform went into effect at least for its first few years in operation. The ABA reported that 61 percent of banks had free checking in 2014 which compares favorably to the 50 percent of banks with free checking that the ABA reported in 2010 and the 39 percent of large banks that Moebs Services reported offered free checking two months prior to debit reform taking effect.[17]

2) Using cards to pay for purchases has been on the rise. Some argue that merchants feel like they have to accept Visa and Mastercard regardless of the fees that are charged, or consumers will go elsewhere. Others believe that these cards allow for convenience and higher buying power benefiting both parties. Have you seen where retailers feel compelled to take Visa and Mastercard or else lose out on a sale?

Retailers are compelled to accept Visa and Mastercard due to the highly competitive nature of retail. Because those two networks bring together the market power of virtually all of the banks across the nation, there are not adequate ways for merchants to do business without the cards. In fact, economists have found that due to the market power of Visa and MasterCard, merchants have no real choice but to accept credit cards. While the credit card industry likes to say merchants have a choice, this argument would be like AT&T claiming in the 1980s that no one should worry about its monopoly because people could choose not to have a telephone. Accepting cards is essential for most businesses – as the U.S. Department of Justice has concluded.[18]

In fact, the Kansas City Federal Reserve studied this and concluded, "Only monopoly merchants who are facing an inelastic consumer demand may deny cards when the fee exceeds its transactional benefit. . . Merchant competition allows the network to set higher merchant fees.

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[16] *Region Banks Refrain from Raising Checking Account Fees,* Nwi.com (Nov. 9, 2010), available at http://www.nwitimes.com/business/local/article_337b378b-3f74-5a00-9d86-b9e6b3d58799.html ("Bucking a national trend, the region's community banks aren't raising fees or putting the breaks on free, non-minimum-balance checking accounts, yet. A recent Bankrate.com national survey on checking accounts indicates the percentage of checking accounts with no monthly service charges and no minimum balance fell to 65 percent in 2010 from 76 percent in the 2009 study.")

[17] Cadence Bank, "ABA: Most Americans Pay Nothing for Bank Services," available at https://cadencebank.com/about/resources/aba-survey---most-americans-pay-nothing-for-bank-services; American Bankers Association, "ABA Survey Shows Majority of Bank Customers Pay Nothing for Monthly Bank Services," available at http://www.prnewswire.com/news-releases/aba-survey-shows-majority-of-bank-customers-pay-nothing-for-monthly-bank-services-104516904.html; Ismat Sarah Mangla and Tali Yahalom "Bank Accounts: Get a Fair Shake, not a Shake-Down," CNN Money (Aug. 31, 2011) available at https://money.cnn.com/2011/08/31/pf/bank_accounts.moneymag/index.htm ("This was backed by data from Moebs Services, which found that 39% of big banks offered free checking in 2011, down from 64% in 2010").

[18] *See* Complaint, U.S. v. Visa, Inc. and Plaid, Inc. (Nov. 5, 2020) at ¶3.

The network can always set higher merchant fees in more competitive markets. Moreover, in competitive markets the merchant fees in the long run may exceed the sum of the merchant's initial margin and the merchant's transactional benefit. . . . As long as the merchant fee does not exceed the level that gives merchants negative profits, merchants may have no choice but to continue accepting cards."[19] The courts also agree that Visa and MasterCard both have market power which means they have the ability to raise their prices above what would be sustained in a competitive market.[20]

The problem is not that there is no benefit to credit and debit cards. There are benefits. But, because the market lacks competition, the pricing and related terms mean that the cards are a net negative for merchants, consumers, and the economy as a whole. Simply introducing competition could change that situation and make payments far more efficient. That competition would also incentivize innovation that would make card payments more valuable. The time is overdue to bring competition to bear on payment cards.

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[19] Fumiko Hayashi, "A Puzzle of Card Payment Pricing: Why Are Merchants Still Accepting Card Payments?" Federal Reserve Bank of Kansas City (2004) available at https://ideas.repec.org/p/fip/fedkpw/psrwp04-02.html.
[20] *U.S. v. Visa U.S.A., Inc.*, 344 F. 3d 229 (2d Cir. 2003).