

**WRITTEN STATEMENT**

**JOSHUA PEIREZ**

**CHIEF PAYMENT SYSTEM INTEGRITY OFFICER  
MASTERCARD WORLDWIDE**

**BEFORE THE**

**TASK FORCE ON COMPETITION POLICY AND ANTITRUST LAWS  
OF THE  
HOUSE COMMITTEE ON THE JUDICIARY**

**MAY 15, 2008**

Good morning Chairman Conyers, Ranking Member Chabot, and members of the Task Force. My name is Joshua Peirez, and I am the Chief Payment System Integrity Officer for MasterCard Worldwide in Purchase, New York. It is my pleasure to appear before you today to discuss H.R. 5546.

MasterCard is a driving force at the heart of commerce, enabling global transactions and striving to make commerce faster, more secure, and more valuable to everyone involved. We are brought together at this hearing today by a commercial dispute. In short, there are many merchants who would like to pay less than they currently do for the payment card acceptance services they receive from their local banks. We at MasterCard fully respect and understand the desire to reduce the costs of doing business. As I will discuss in a minute, merchants have the ability to negotiate today to reduce their costs. In our view, there is every opportunity outside of legislation to achieve common ground between merchants and payments providers and MasterCard is committed to finding that common ground.

At the outset, I would like to discuss some of the steps MasterCard has taken to address key concerns expressed by merchants as part of this debate. For example, a number of years ago, merchant representatives expressed concern that acquirers were requiring merchants by contract to comply with applicable MasterCard rules but were not disclosing those rules to the merchants. The MasterCard rules were specifically designed to address this issue by requiring acquirers to include in their merchant agreements the substance of any rule the merchant was obligated to comply with. This requirement was designed to ensure that merchants understood the MasterCard rules with which they were bound to comply. Nonetheless, in response to merchant requests, MasterCard began publishing on our website the portions of our rules that apply to merchants. These rules can be found at [www.mastercard.com](http://www.mastercard.com).

More recently, merchant representatives indicated that it would be helpful to also have ready access to the MasterCard chargeback rules. These rules govern the rights and responsibilities of issuers and acquirers when a cardholder disputes a transaction and the issuer grants a credit to the cardholder and “charges back” the transaction to the acquirer. Although those rules do not govern the relationship between acquirers and merchants, merchant representatives expressed interest in accessing the rules because acquirers typically require the merchant to provide reimbursement for the “chargeback.” In order to accommodate these merchant requests, MasterCard now publicizes the chargeback rules on our website. The Merchants Payments Coalition (“MPC”) has now come forward and indicated that they would like to see other rules as well. I would like to take this opportunity to inform the Task Force that MasterCard will make its entire set of operating rules available to the public in the near future. This will give merchants and anyone else who is interested the ability to review all of MasterCard’s rules.

We also heard concerns from merchants that they did not have access to the default interchange rates paid by their acquiring banks to issuing banks. Although merchants do not pay the interchange fee, MasterCard recognized that publication of the interchange fees would give merchants additional information for them to use when negotiating the price of MasterCard acceptance with their acquirers. To assist merchants in negotiating the merchant discount fees they pay, MasterCard has published the default interchange rates for our systems. These rates, which are readily accessible on our website at [www.mastercard.com](http://www.mastercard.com), provide an extraordinary tool for merchants which enables them to understand the interchange fee costs of an acquirer

when negotiating the merchant discount fee with the acquirer. It is our hope that merchant groups such as the MPC will be encouraged to use this tool to better educate themselves and their members on the full range of negotiating opportunities that exist today rather than seeking to lower merchant discount fees through government intervention.

MasterCard management has also responded to market forces in efforts to increase merchant demand for our cards. MasterCard management independently sets default interchange rates in order to maximize the value of the system as a whole. This requires a careful balance, which takes into account the interests of cardholders *and* merchants. For example, we set lower default interchange rates for supermarkets, utilities, and convenience purchases to encourage acceptance by these merchants and maximize the value of the system. We also capped default interchange rates on petroleum sales, based on concerns that rising gas prices were disproportionately affecting gas stations when they accepted payment cards and to maintain the balance of value in the system.

These developments are part of our efforts to address merchants' concerns about their ability to negotiate for the cost of MasterCard acceptance. It is important for me to raise our efforts with the Task Force because, although the MPC states that its only desire is for merchants to have the ability to negotiate, what you are not hearing from the MPC is that merchants have that ability today. We would like to work with the Task Force to ensure a better understanding of those opportunities for negotiation. And, frankly, the merchants could improve their use of those opportunities. Let me provide some examples of where the merchants have not taken advantage of the tools we have provided.

As I noted, MasterCard has capped the default interchange rates on petroleum sales. We announced this change in September 2006, and it became effective in April 2007. We expected petroleum retailers to use this information to negotiate lower merchant discount rates with their acquiring banks and to point to our initiative to leverage lower fees from our competitors. We have been disappointed to learn, however, that most petroleum merchants have not taken advantage of this opportunity to negotiate better rates for MasterCard acceptance based on the reduced default interchange rate and we see no evidence they are using it to reduce what they pay to accept payment cards on competing networks.

Furthermore, the publication of MasterCard's rules and default interchange rates was also designed to allow merchants to enhance their ability to negotiate the terms of MasterCard acceptance, including their merchant discount fees. Merchants are given valuable information regarding the rules that would apply to them, and the costs their acquiring banks pay to issuing banks in default interchange rates. With this information merchants have the ability to negotiate with hundreds of acquiring banks to get the best rates and terms they can. And, I may note, this cost information is far more than merchants give consumers when consumers are shopping in a store. For example, merchants do not display their cost on an item alongside the price they are charging. Yet what MasterCard has done is to provide to merchants the acquirers' interchange costs so that merchants can be fully informed of those costs when negotiating their merchant discount fees with the acquirers.

Although we agree that negotiation is the best way forward, we are concerned that the MPC is really not pursuing negotiation as a solution. Merchants negotiate merchant discount fees every day when they seek to accept American Express cards. Throughout the debate, we

have never heard a single merchant claim that they “must” accept American Express cards, and indeed many merchants do not (just as many merchants do not accept MasterCard). Yet the merchant discount fees that merchants agree to pay when they choose to accept American Express cards are higher on average than the fees they pay when they choose to accept MasterCard cards. This begs the question if merchants are willing to pay more for American Express when they readily admit they do not have to accept the American Express card, how can they claim that our system which involves interchange fees and results in average merchant discount fees that are lower raises an issue that must be addressed by Congress? We think the answer to this question is clear—the MPC’s initiative is not really targeted at addressing a competition law issue, but instead is an effort to artificially reduce merchant discount fees through governmental intervention.

In short, the MPC claims that there is a competition law problem but seeks to resolve its complaint in anticompetitive ways. As the congressionally created Antitrust Modernization Commission noted, “[v]igorous competition, protected by the antitrust laws, does the best job of promoting consumer welfare and a vibrant, growing economy.” If a particular practice raises antitrust concerns, its disposition is best left to the judicial enforcement of existing law as opposed to legislating toward a specific outcome. Not only is the MPC seeking legislation, but the merchants have already sought judicial intervention through use of the antitrust laws as the way to resolve this issue. In fact, well before coming to Congress, trial lawyers seeking to represent all U.S. merchants as a class commenced litigations against MasterCard and Visa and their customer banks on the very same issues covered by H.R. 5546. The MPC appears reluctant to note that while they are asserting to the Congress that the current antitrust laws will not solve their problems, their attorneys are claiming the ability to solve those problems through litigation under the very same antitrust laws. I would like to offer a quote from one of the attorneys representing the merchants in their litigation against MasterCard. This is the statement of K. Craig Wildfang, lead counsel to the merchants, as it appeared in Competition Law 360 on November 2, 2007: “I actually don’t think that the antitrust laws are in need of much reform. Although the Antitrust Modernization Commission considered many proposals and proposed a few, I don’t think that anyone has really made a persuasive case that the U.S. antitrust laws are not working well to achieve their goals of enhancing and preserving competitive markets.” If Mr. Wildfang is unaware of a persuasive case to reform our existing antitrust solutions to competition concerns, that would suggest H.R. 5546 is unnecessary.

The MPC also appears reluctant to highlight that just prior to the introduction of H.R. 5546 the parties in that litigation agreed to mediation which began last month. The mediation is being overseen by an outside mediator, and if a resolution is achieved through mediation, it will be presented to the court for purposes of resolving the litigation. This mediation is yet another example of how the MPC’s efforts to secure legislative action are entirely unnecessary to achieve their stated objective of negotiating their concerns.

Before I close, I would like to dispel a number of other myths that have been created by the MPC during this debate. For example, the MPC says that MasterCard makes it difficult or impossible for merchants to discount for cash. This is simply not true. The MasterCard rules simply and clearly state that: “A merchant may provide a discount to its customers for cash payments.” These rules, which are publicly available on our website, impose no restriction on how a merchant offers a cash discount. This means that the merchant can post two prices, can simply post a sign offering “X% off for cash,” or can choose any other method the merchant

believes is best for the merchant and its customers. Any interpretation of MasterCard's rules to the contrary is false.

The MPC also states that merchants cannot disclose to cardholders the merchant discount merchants pay when cardholders pay with a payment card. MasterCard does not restrict any merchant from disclosing its merchant discount fees to consumers. For example, merchants can post their merchant discount rates on signs throughout their stores, or could disclose the rates on each payment card receipt along with the dollar amount of the merchant discount fee for each transaction. Merchants are also free to disclose interchange fees to consumers as well.

It has also come to my attention that the MPC has even gone so far as to claim that MasterCard has a rule that requires a merchant that accepts MasterCard to accept it at every retail location. The MPC refers to this mythical rule as the "single entity rule." There is no such rule. A merchant that would like to accept MasterCard at one of its several locations is not required by MasterCard rules to accept it at other locations. Whether a merchant accepts MasterCard at one, some, or all of its locations is strictly a matter to be negotiated between the merchant and its acquiring bank.

The last myth I would like to address relates to the benefits merchants receive when they pay a merchant discount fee. The MPC believes that the merchant discount should cover the cost of processing a payment card transaction, plus a profit margin acceptable to the MPC. In other words, the MPC seeks to obtain for merchants all of the benefits of card acceptance, while paying only for the small portion of those benefits that relate to "processing." This is roughly analogous to requiring merchants to sell their products for the cost of shipping and accounting without regard to all of the other costs, or any of the value or other factors that go into determining the price of a product.

Merchants receive enormous benefits when they choose to accept payment cards. These benefits include increased sales from accessing the vast purchasing power of millions of cardholders around the globe. Merchants are able to access these global payment systems and financing without undertaking any of the operational costs and burdens involved when merchants operated their own payment card systems. In the MasterCard system, for example, our customer financial institutions: market the cards; process the applications; grow the customer base; underwrite the credit; comply with the complex and growing body of payment card law; perform all of the accounting functions; and collect the debts. Moreover, payment cards provide the extraordinary benefit of enabling a merchant to sell goods and services on credit without taking any credit risk—the merchant gets paid even if the card issuer is unable to collect anything from the cardholder. By accepting cards, merchants also avoid or reduce costs associated with other forms of payment like the costs of bounced checks and check verification services and the costs of paying employees to handle, count, and safeguard cash as well as the significant costs of cash theft.

Under the MPC's approach, merchants would pay nothing for these benefits and, instead, would receive all of those benefits at roughly the processing costs incurred to deliver the benefits to the merchant. This begs the question as to who pays the costs when merchants take benefits from the system without paying for them. Unfortunately, the answer is that consumers would pay.

Mr. Chairman, we deeply appreciate your concerns about this issue. It is our hope that we can work together to address fully your concerns without the need to move forward with legislation. We are concerned that H.R. 5546 would impose price controls that would disproportionately harm community financial institutions and, as we have seen in other contexts, price controls have significant negative consequences for consumers. We fully believe that negotiation provides the best way forward, but we have concerns about granting antitrust exemptions that would enable the merchants to negotiate in ways that violate the antitrust laws today.

With respect to legislation attempting to regulate the costs of payment card acceptance, we can look to Australia for evidence of how consumers are harmed when the government regulates interchange. A few years ago, the Reserve Bank of Australia (“RBA”) decided to reduce interchange by approximately 50% for the MasterCard and Visa systems in Australia. MasterCard recently commissioned a study on the effects of the RBA’s intervention.<sup>1</sup> What did the study find? The merchants benefited from reduced costs of accepting cards while consumers paid the price. Cardholders in Australia now pay higher fees and rates for their cards and receive fewer benefits. Australian consumers are now paying 22 percent more in annual fees for standard credit cards, and as much as 77 percent more for rewards cards. Not surprisingly, there is no evidence that merchants passed their windfall on to consumers in the form of lower retail prices. In order to ensure that U.S. consumers are protected against the same fate, we must ensure that price controls are not part of any resolution of the commercial dispute between merchants and payment systems. We would hope that the Members of the Task Force would encourage the MPC to utilize the tools we have provided to take advantage of the negotiating opportunities available to them before seeking legislative intervention.

I also urge the Task Force to consider the findings of the Antitrust Modernization Commission, on which two representatives from the MPC served, as those findings relate to creating exemptions to antitrust laws. For example, the Commission noted that “[a]ntitrust exemptions can harm the U.S. economy and, in the long run, reduce the competitiveness of the industries that have sought antitrust exemptions.” Furthermore, the Commission stated flatly that “statutory antitrust exemptions should be disfavored as likely to harm both U.S. consumers and the U.S. economy.” Why does the Commission come to these conclusions? The Commission stated that “[w]hile the beneficiaries of an exemption likely appreciate reduced market pressures, consumers...and the U.S. economy generally bear the harm from the loss of competitive forces.” Such a result does not appear to be the intent of the legislation, but the Commission’s statements raise issues that should give the Task Force significant pause.

Mr. Chairman, this concludes my testimony. MasterCard is fully committed to working with you and the Task Force to address these important issues. I am prepared to answer any questions you or others on the Task Force may have.

---

<sup>1</sup> A copy of the study and its transmittal letter are attached to this statement. These documents can also be found at [http://www.crai.com/ecp/assets/Stillman\\_et\\_al\\_cover\\_letter\\_\(28\\_Apr\\_2008\).pdf](http://www.crai.com/ecp/assets/Stillman_et_al_cover_letter_(28_Apr_2008).pdf) and [http://www.crai.com/ecp/assets/Regulatory\\_Intervention.pdf](http://www.crai.com/ecp/assets/Regulatory_Intervention.pdf).