





then worked to develop a broad-based coalition that ultimately included numerous consumer, labor and good government groups, to qualify the citizen's initiative to ban double ATM surcharges, Proposition F, for the November ballot. Members of the Campaign To End Extra ATM Fees ranged from CALPIRG and the United Steelworkers to AARP, Consumers Union, Consumer Action, and numerous local political clubs. It is estimated that the California Bankers Association spent \$500,000 in attempts to defeat the initiative, including direct mail and television and radio buys. The citizens' campaign spent about \$15,000.

Second, two progressive members of the Santa Monica City Council, Kevin McKeown and Michael Feinstein, deserve credit for enacting the nation's first ATM surcharge ban ordinance, in October 1999. Working with CALPIRG, they were able to win in the City Council and didn't need to go to the ballot.

## **2. ATM Surcharges Are Double Fees. Charging Consumers Twice Is Unfair**

***"No business should be expected to provide free service to non-customers," said Gene Taylor, president of the bank's Western Region. "Bank of America built the nation's largest ATM network for people who choose to do business with us, and we think it's reasonable to charge non-customers for the optional convenience of this service."***

--Bank of America press release announcing it was blocking ATM access to non-customers in Santa Monica to protest new ordinance, 10 November 1999

***Blocking ATM access in the city is an attempt by Wells Fargo and Bank of America to "punish consumers for being in a community willing to protect them."***

-- Santa Monica City Attorney Adam Radinsky, in reply.

### **A. Consumers Don't Get A Free Lunch. Consumers Pay Twice For Lunch.**

Over the last few years, bank public relations firms have worked hard in an attempt to re-define their own industry term "ATM surcharge" to the softer, more benign-sounding terms "access fee" or "convenience fee." Their not so transparent effort is more sophisticated than it seems-- it is part of a larger effort to confuse consumers, the media, and policymakers into the mistaken belief that ATM owners were not compensated by non-customers before national surcharging began in 1996. Incredibly, they have claimed, "there is no such thing as a free lunch" or "who could expect banks to give away our services for free?"

In fact, since banks first formed shared ATM networks, and allowed other banks' customers to use their ATMs, ATM owners have been compensated by a customer's own bank, through a fee known as the interchange fee. According to numerous studies, the interchange fee, set by the ATM network member-owners and paid by the customer's bank to the ATM owner, averages between 40-60 cents per transaction. The customer's bank compensates the network itself with a "switch" fee of between 2-12 cents.

Where does the "interchange fee" and "switch fee" payment come from? That's up to the consumer's bank. However, most banks now pass it along by imposing a foreign fee on their own customers that use other banks' machines, although some may waive this fee for high-balance customers. According to the 1999 Federal Reserve Board Annual Report to Congress, in 1998, 82% of multi-state banks and 73% of local banks imposed foreign fees. The Fed noted that, for a two year period following the imposition of national surcharging, the number of banks charging foreign fees had dropped, but that in 1998 the incidence of foreign fees "increased significantly and sharply."

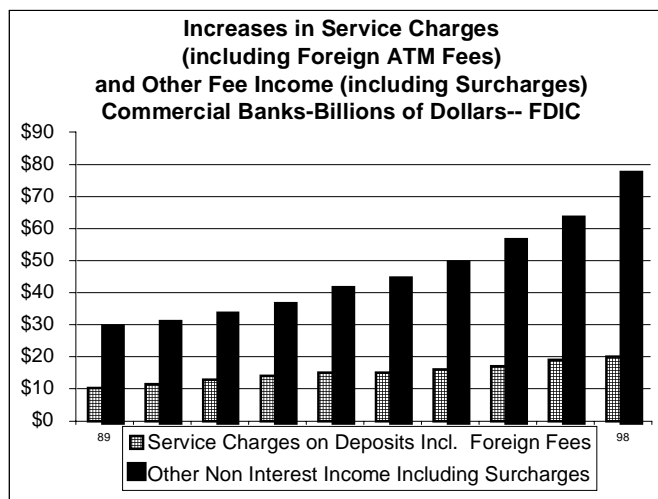
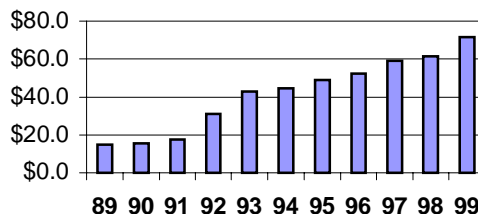


### C. How ATM Surcharges And Foreign Fees Contribute To Bank Profits

In 1999, banks had their ninth straight year of record profits. The \$71.7 billion reported to the FDIC exceeded last year's record of \$61.8 billion by 16%, or \$9.9 billion. According to the FDIC, "continued strength in non-interest revenues, particularly fee income," is a critical part of commercial bank income. For example, non-interest income accounted for 44% of net operating revenues in the fourth quarter 1999.

In the Federal Deposit Insurance Corporation's quarterly reports on bank income and expenses, ATM surcharges are incorporated in the lump-sum category, "other non-interest income." This fast growing category includes credit card fee income and other fees. Foreign ATM fees are incorporated in the category "Revenue from deposit account service fees."

**Fee Income Helps Drive Ninth Record Year for Commercial Bank Profits**  
Profits-Billions of Dollars -- Source FDIC



Specific 1999 data on contributions from service fees on deposit accounts and other non-interest income, are not yet available, but 1989-1998 data on these income categories shows impressive growth. In 1989, service charges on deposits, including foreign fees, were \$10.3 billion, rising to \$19.8 billion in 1998. Other non-interest income, including surcharges, rose from \$29.0 billion in 1989 to \$77.2 billion in 1998.

In March 2000, BankRate.com projected that ATM surcharge revenues would total \$2 billion in 2000, consistent with previous PIRG and U.S.

Congressional Budget Office estimates that ATM surcharge revenues annually total over \$2 billion.<sup>4</sup> Although the total number of foreign transactions has declined slightly, the percentage of banks surcharging and the amount of the surcharge have both increased, maintaining surcharge revenue at over \$2 billion.

Data from the banks' lawsuits against Santa Monica and San Francisco are illustrative. In declarations to the court, Bank of America and Wells Fargo estimated that their surcharge revenues annually in these two cities alone, totaled \$5,840,000. Other banks had combined annual surcharge revenue of \$1,182,820. So, banks in those two cities alone earn \$7 million annually on surcharges<sup>5</sup>. These totals for ATM surcharges revenue do not include interchange fee revenue, foreign fee revenue, and other ATM fee income.

<sup>4</sup> According to GAO, banks owned 132,000 ATMs in January 1998 and averaged 1,023 off-us ATM transactions per machine per month (the increase in the number of ATMs has resulted in a decline in per-ATM transactions). At a 93% surcharging rate at \$1.37/transaction, this corresponded to annual ATM surcharge revenue of approximately \$2.1 billion.

<sup>5</sup> Throughout report, all data on San Francisco and Santa Monica ATM market and profits from Briefs and Declarations of bank officials in Motion for Preliminary Injunction, *Bank of America, Wells Fargo and California Bankers vs. City and County of San Francisco and City of Santa Monica*, CV 99-4817 VRW, see, e.g., declaration of William Raymond, Senior Vice President, Bank of America, November 2, 1999.















<b>SUMMARY OF THE SUM SELECTIVE SURCHARGING PROGRAM</b>		
<b>Number of Banks, Credit Unions and ATMs by state.</b>		
	<b>ATMs</b>	<b>Banks/Credit Unions</b>
CT	275	40
KY	1	1
MA	1493	246
ME	1	1
NH	15	5
NY	60	8
RI	5	2
TN	1	1
<b>TOTALS</b>	<b>1851</b>	<b>297</b>
State by state totals greater than 297 due to multi-state members. [SUM IS OWNED BY THE NYCE ATM NETWORK] Data derived from [ <a href="http://www.sum-atm.com/">http://www.sum-atm.com/</a> ]		

**Second, consumers should beware that the benefits of the SUM program (and similar selective surcharge alliances) are partial. These programs help consumers avoid surcharges, but not foreign fees.** Consumers seeking to avoid ATM fees should still seek to use their own bank's machines. A March 2000 survey by MASSPIRG, for example, found that 12 of 27 SUM members impose foreign fees on their customers using other SUM bank's machines. Two others gave consumers 3 free foreign transactions before imposing foreign fees. [See < <http://www.masspirg.org/masspirg/>> and click "Free Checking"]

**Third, community banks should beware that Sum's existence is fragile. It is primarily owned by surcharging big banks.** Further, SUM is owned by NYCE, which is 96% owned by 8 large, surcharging banks, each with a 12% share: Bank of New York, BankBoston, Chase, Citibank, Fleet, Marine Midland, Peoples<sup>15</sup> and Summit. The other 4% is owned by 150 community banks.

**Finally, policymakers should beware that the SUM program isn't a market-based solution to surcharging.** In fact, it wasn't until the Department of Justice intervened that the SUM participants were allowed to set it up. If left up to the "market," the big banks would have been successful in their attempt at blocking the creation of selective surcharging programs.

Unfortunately, these efforts may be too little, too late, as big banks have developed powerful ATM networks of their own, through mergers and acquisitions. In Boston, for example, the dominant bank, Fleet, owns more than half of the ATMs. It owns 40% of all ATMs in the state. In San Francisco, Wells and Bank of America own an even larger share, 86%, together. City residents, especially, bear the brunt of big-bank dominated surcharges and the other negative effects of bank mergers and bank consolidation. It is entirely appropriate that cities, and their citizens, lead the fight against unfair surcharges.

#### **D. Wells Fargo and Bank of America Denial of Access May Violate Network Rules**

As part of their orchestrated campaign to chill further surcharge ban activity by other cities, Bank of America and Wells Fargo widely trumpeted their plans to restrict access to Santa Monica and San Francisco ATMs to their own customers unless an injunction was granted. In November, Bank of America, for example, said "No business should be expected to provide free service to non-customers." In fact, at least in Santa Monica, the two big banks are **still** banning access to non-customers. But other banks in the city are saving consumers money, since most are not surcharging despite the temporary injunction blocking the ban.

Nevertheless, their prohibition on non-customer access may violate ATM network anti-discrimination rules that require a bank's machines to be open to other bank's customers if it wants to participate in the network. The rule is a logical one. Since networks are special arrangements between supposed competitors, those competitors are supposed to act fairly, as a condition of network participation.

<sup>15</sup> Peoples may not yet surcharge, since surcharging was banned in Connecticut until December 15, 1999.





**STATUS OF ATM SURCHARGE BANS -- REGULATIONS/LAWS/ORDINANCES**

**STATE REGULATIONS**

IOWA – banned ATM surcharges by Banking Commissioner order of October 23, 1997.	Although a District Court upheld Iowa’s EFTA regulation on July 24, 1998, that decision was overturned by the 8th Circuit on September 2, 1999. The ruling was silent on the EFTA’s surcharge provisions, and only discussed other provisions. On appeal, the Iowa Bankers Association, the Iowa Community Bankers Association, and the Iowa Credit Union League filed friend of the court briefs on the side of the state.	On February 2, 2000, the Iowa Attorney General filed a petition to the Supreme Court seeking review of its case.
CONNECTICUT – Banned ATM surcharges by Banking Commissioner order of November 9, 1998.	The State Supreme Court ruled in December 1999 that the Banking Commissioner did not have authority to ban surcharges. Since no preemption determination was made, the matter is proceeding in the legislature, not the federal courts.	Proposed House bill 5014 in the legislature would impose a surcharge ban by law. See below.

**ENACTED CITY ORDINANCES BANNING ATM SURCHARGES**

Santa Monica (Ordinance proposed by Council members McKeown and Feinstein)	On October 5, 1999 the City Council voted to ban surcharges. A temporary injunction blocking implementation was granted by US District Court judge Vaughn Walker on 15 Nov 99.	On December 10, 1999 , the cities filed notice of appeal to the Ninth Circuit, supported by friend of the court briefs filed by 9 state Attorneys General (California, Connecticut, Iowa, Minnesota, Nevada, New York, Oregon, Washington, and West Virginia and also by CALPIRG and other consumer groups.
San Francisco	On November 2, 1999 city voters, by referendum (66%-34%), voted to ban surcharges. A temporary injunction blocking implementation was granted by US District Court judge Vaughn Walker on 15 Nov 99.	
Woodbridge, NJ	Enacted February 15, 2000 by 9-0 City Council vote, temporary injunction blocking implementation granted on February 17, 2000.	City is drafting appeal

**PENTAGON BAN ON MILITARY BASES**

Proposed Rule, FR 11 Aug 1999 (Volume 64, Number 154) Page 43855-43858	Would ban ATM surcharges on military bases.	Following comment period, is under consideration by Pentagon. Decision possible in April.
--	---	---

**CITIES CONSIDERING ORDINANCES**

New York City (Intro 680, Vallone)	City Council Speaker Peter Vallone has drafted bill, has more than half of council as co-sponsors, and has released a detailed staff report, “Guilty As Surcharged” < <a href="http://www.council.nyc.ny.us/loi/atm.pdf">http://www.council.nyc.ny.us/loi/atm.pdf</a> >	Hearings expected, April 2000
Newark, NJ	Bill introduced by Council member Carrino February 17, 2000.	
Chicago	Introduced by Alderman Joe Moore, February 2000.	Hearing held 13 Mar 00
Los Angeles	Voted unanimously in October to instruct City Attorney to examine City’s authority to ban fees. Motion made by Council members Alex Padilla and Mike Hernandez. Heard in committee on February 16, 2000	At City Attorney’s advice, waiting until the Santa Monica/San Francisco court case is decided before taking action.
San Diego County	San Diego County - Chairwoman Pam Slater first proposed the ban October 19, 1999.	No action expected until the Santa Monica/San Francisco court case is decided
San Diego	San Diego City - Deputy Mayor Byron Wear proposed an ordinance October 18, 1999.	Mayor refuses to docket issue for vote.
West Hollywood	To ban surcharges	Voted December 20, 1999 to

<b>STATUS OF ATM SURCHARGE BANS -- REGULATIONS/LAWS/ORDINANCES</b>		
		file an amicus brief on behalf of Santa Monica Sponsor was Council member Paul Koretz
Eugene (OR)	To ban surcharges	Campaign underway, bill may be drafted soon.
Salem, (OR)	To ban surcharges	Council voted 5-4 not to draft bill at this time.
Portland (OR)	To ban surcharges	Campaign underway, bill may be drafted soon.

**STATE LEGISLATIVE PROPOSALS-2000 Session**

Connecticut (HB 5014-Landino)	Would ban ATM surcharges. The State Supreme Court ruled in December 1999 that the banking commissioner's administrative ban had overstated his authority. Since no preemption determination was made, the matter can be resolved in the legislature.	Hearings held February 17, 2000. Bill passed by Joint House-Senate Committee by vote of 11-6 on March 7, 2000 despite opposition of State Senator McDermott, Co-chair of Banking Committee (Similar to bill that passed House in 1999 by 125-20 but Senate floor action blocked by McDermott)
Illinois	To ban surcharges.	Committee defeated proposed ban 4-3 in February
Massachusetts (SB 19) Senator Andrea Nuciforo (Senate Chair of Banking Committee) and Representative Carol Donovan.	To ban surcharges	Pending in the Ways and Means Committee in the Senate. The bill has a majority of lawmakers signed on in support of the bill.
Minnesota HF 1849 (Entenza)	To ban surcharges.	March 11,2000, First Reading, referred to Commerce
W. Virginia (SB 188) (Majority Leader Chafin and Senator Bowman) Introduced January 25, 2000.	Would limit total cost to consumer of combined foreign fee and surcharge to a "total of fifty cents for any single ATM transaction"	Pending in Banking and Insurance Committee
Wisconsin (SB 325) Sen. Robson/Rep. Lehman.	To ban surcharges	Passed Senate Financial Institutions Comm. 3-2, killed on Senate floor 16-17 on February 8, 2000.

**CONGRESSIONAL PROPOSALS**

H.R.3229 (Sanders-I-VT)	Introduced November 14 1999, would ban ATM surcharges.	No action by committee.
H.R. 3494 (Sanders-I-VT)	Introduced November 18, 1999, would clarify that no federal law supercedes Electronic Funds Transfer Act (EFTA) provision clearly granting states and localities authority to ban ATM surcharges.	No action by committee
H.R. 3503 (Waters-D-CA)	Introduced November 18, 1999, would ban ATM surcharges, would enact low-cost lifeline banking requirements and would reinstate Federal Reserve Board Annual Report to Congress on bank fees that was allowed to sunset in 1999.	No action by committee

**For more information, see the state PIRG's ATM website:  
<<http://www.stopatmfees.com>>**