

Surcharging Legal and Regulatory Overview

September 2021

This document is meant to provide an overview of the surcharging landscape in the United States.¹

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¹ However, this document is not legal advice and is not meant to be relied upon to determine the outcome or handling of any specific transaction.

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sales@interpayments.com

145 Forest Ave. Palo Alto, CA 94301

I. What is surcharging?

Surcharging is a mechanism for merchants to recover credit card processing costs by adding a fee to the cost of the goods or services their customers purchase using credit cards. Merchants surcharge to recover some or all their credit card processing fees, which are a top 3 cost item for the average U.S. merchant.

In the United States, surcharging is generally only permitted on credit cards as Visa and Mastercard prohibit surcharging debit cards and prepaid cards.

a. What fees can be recovered through surcharging?

All per-transaction credit card processing fees assessed on a merchant can be recovered through surcharging, in an amount not to exceed four percent (4%) of the underlying transaction amount. Those fees include:

- Interchange
- Card Brand
- Gateway
- Acquirer
- Authorization
- Other per-transaction fees

Note, however, that any fees invoiced separately or not paid via the mechanism of the per-transaction merchant discount fee cannot be recovered through surcharging. For example, merchants cannot recover the cost of renting point-of-sale terminal equipment via surcharging.

b. Surcharging vs. Alternative Credit Card Fee Recovery Mechanisms

There are 4 primary mechanisms merchants may use to recover credit card processing fees:

Fee Offset Method	Description	Allowed Payment Channel	Regulatory Authority/Requirements
Surcharge	Advertise one single price across all products, but add a \$ or % fee as separate line item (like sales taxes) to final checkout total for credit card transactions only The maximum surcharge amount must never exceed the merchant's cost of credit card processing	All channels	State governments, Card Brand Rules ²

² Card Brand Rules refers to the merchant network rules for Visa, Mastercard, American Express and/or Discover.

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Cash Discount	Advertise higher "standard" credit card price across all products, but discount checkout price for non-credit card payment methods	All channels	Federal and state governments, Card Brand Rules
Convenience Fees	Apply a single fixed \$ or % fee to any transaction method (credit, debit, prepaid) through a payment channel for the privilege of paying through that payment channel	Only <u>one</u> non-customary, Card Not Present channel	Card Brand Rules
Service Fees	Only allowed for specific non-profit merchant categories, such as government and education; apply a single fixed \$ or % fee to any card transaction (credit, debit, prepaid)	All channels	Card Brand Rules

II. Anti-Surcharge Laws and Litigation

Several states have anti-surcharge statutes in place that forbid merchants from surcharging credit card transactions in those states. In recent years, merchants have successfully challenged the constitutionality of several of these anti-surcharge statutes. These challenges have largely come from merchants employing "single-sticker" price displays, which display the price of a good and a percentage or dollar amount fee added to the price for credit card purchases.

a. State Anti-Surcharging Laws

State anti-surcharging laws are generally considered to be consumer protection measures; however, not all state statutes are limited to the consumer code. Some state surcharging laws are crafted in a manner that may not prohibit surcharging of commercial transactions. To ensure full compliance with all anti-surcharge laws, InterPayments currently does not differentiate between consumer and commercial transactions when determining the potential applicability of a state's anti-surcharge law.

Currently, there are only three states that have enacted anti-surcharge statutes where 1) the statute has not been held to be unconstitutional (either generally or as applied to the specific plaintiff) and 2) there are no publicly available court holdings or regulatory opinions discussing the potential constitutionality of these statutes. These three states are Colorado (effective through June 30, 2022), Connecticut, and Maine.

In July 2021, Colorado's Governor signed a new law that permits businesses that accept credit cards as a form of payment for sales or lease transactions to assess a surcharge on such transactions in an amount not to exceed, in the merchant's discretion, either (i) two percent (2%) of the total cost of the transaction or (ii) the card processing fees the merchant incurs in processing the transaction. This law will become effective on July 1, 2022.

Anti-surcharging statutes have been challenged or questioned, but technically remain enforceable, in several other states: California, Kansas, Massachusetts, Oklahoma and Texas. In these states, courts have held the statutes are unconstitutional as applied to specific merchant plaintiffs or government actors have issued opinions acknowledging the state's anti-surcharge ban may not withstand constitutional scrutiny. Where anti-surcharging statutes have been found unconstitutional as applied to a specific plaintiff, state attorneys general have noted each surcharge would need to be evaluated based on its particular facts and have emphasized a lack of disclosure for the surcharge or a merchant profiting from the surcharge as non-exclusive scenarios where the anti-surcharge statute may still prohibit a surcharge.

Please see the appendix for more information on the current statutory landscape, including a review of pending legislation.

b. Anti-Surcharge Litigation

As noted above, anti-surcharge statutes have been challenged successfully by merchants in court. In these challenges, merchants generally argued that state anti-surcharge statutes at issue regulated their speech in violation of the First Amendment to the Constitution. In 2017, the U.S. Supreme Court held that New York's anti-surcharge statute was a regulation of speech rather than a regulation of conduct as New York had argued. This Supreme Court decision has set the tone for the re-examination of state anti-surcharge statutes.

The table below summarizes these legal challenges in states where the law remains enforceable:

State	Case	Outcome
California	<i>Italian Colors Restaurant et al. v. Becerra</i> , No. 15-15873 (9th Cir. 2018)	California's anti-surcharge statute was an unconstitutional restriction on speech as applied to the merchant plaintiffs.
Kansas	<i>CardX, LLC v. Schmidt</i> , No. 2:20-cv-02274, 2021 WL 736322 (D. Kan. Feb. 25, 2021)	Kansas's anti-surcharge statute was an unconstitutional restriction on speech as applied to the third party card processor plaintiff.
Texas	<i>Rowell v. Paxton</i> , 336 F. Supp. 3d 724 (W.D. Tex. 2018)	Texas' anti-surcharge statute was an unconstitutional restriction on speech as applied to the merchant plaintiffs.
New York	<i>Expressions Hair Design v Schneiderman</i> , 32 N.Y.3d 382 (2018)	New York's anti-surcharge statute permits merchants to impose surcharges as long as the total price for card purchases is displayed to the cardholder in "dollar-and-cents" form (e.g., the price for an item should be disclosed as \$100 cash or \$103 credit, instead of \$100 plus a 3% surcharge for credit).

III. Card Brand Surcharge Rules

a. Visa and Mastercard Settlement

Visa and Mastercard have not always permitted surcharging. Merchants filed a class action lawsuit against Visa and Mastercard, accusing them (along with certain issuing banks) of fixing merchant interchange fees in violation of anti-trust laws. In 2013, Visa and Mastercard relaxed their anti-surcharge rules as part of a merchant class action lawsuit settlement. As a result, merchants are permitted to assess a surcharge on certain Visa and Mastercard credit card transactions, but not on other card transactions (i.e., debit or prepaid card transactions). Merchants choosing to assess surcharges will be subject to the restrictions set forth in the Card Brand Rules.

b. Brand vs. Product Surcharging

Merchants may assess surcharges at either the “brand level” or the “product level.” Brand level surcharges are applied to all credit cards of the card brand (e.g., all Visa credit cards). Product level surcharges are applied to all credit product types regardless of the card brand (e.g., all premium credit cards).

For illustration purposes, merchants surcharging at the brand level might add a three percent (3%) surcharge on all Visa credit cards, whereas merchants surcharging at the product level might add a three percent (3%) surcharge to Visa Signature Preferred credit cards, a two percent (2%) surcharge on Visa Signature credit cards and a one percent (1%) surcharge on Visa Traditional credit cards.

InterPayments offers a solution to enable its merchant customers to surcharge at the product level.

c. Point of Interaction

Card brand rules dictate the surcharge be imposed based at the Point of Interaction (“POI”), or the location at which the transaction occurs. A card-present transaction’s POI is the location of the physical terminal. A card-not-present transaction’s POI is the cardholder’s billing zip code. For card-not-present surcharging, the cardholder’s billing zip code and that state’s corresponding surcharging regulations determine whether the card can be surcharged.

d. Visa and Mastercard Surcharging Requirements

With respect to surcharging, Visa and Mastercard impose similar requirements on merchants.

Surcharges cannot be assessed at both the brand level and the product level. Additionally, Merchants assessing surcharges will have to comply with certain key requirements, such as the following:

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1) Notification Requirements

A merchant that intends to surcharge must provide advance written notice to Visa and/or Mastercard (as applicable), and the merchant's acquirer, at least thirty (30) days prior to surcharging. This notice must identify whether the merchant intends to impose a surcharge at the brand level or product level.

Any merchant that elects to surcharge Visa and/or Mastercard credit card transactions must also provide clear and prominent disclosure to its customers at the point of entry and point of transaction locations. The specific disclosure required is based on the transaction type (e.g., electronic commerce, in-person, etc.) as detailed in the Card Brand Rules for Visa and Mastercard. A chart summarizing the disclosure requirements for the Visa Card Brand Rules is set forth in Appendix 2.

2) Surcharge Caps

Surcharges can be a fixed or variable amount. Merchants may not surcharge in an amount that exceeds their cost of acceptance for cards and, in any event, cannot surcharge in excess of the maximum surcharge cap, which is set at four percent (4%).

For merchants that impose a product-level surcharge, the surcharge must not be more than the merchant's average cost to accept the particular credit product, minus the regulated debit interchange rate (currently \$0.21 + 0.05% of the value of the transaction + \$0.01 (if applicable)). The surcharge amount must be the same for all credit cards in the product level that the merchant has chosen to surcharge.

3) Receipt and Refund

Surcharges must be included in the transaction amount and reflected separately and clearly on the transaction receipt. When issuing a refund, the merchant is also required to refund the surcharge assessed on the transaction.

4) Non-Discrimination

For merchants accepting credit cards issued on other card brands, Visa and Mastercard each prohibit practices that would have a discriminatory effect on their credit cards as compared to those of the other card brand. As an example, if a merchant accepts a competing card brand (e.g., American Express or Discover) that is more expensive to the merchant than Visa or Mastercard, and that card brand limits surcharging, the merchant may only surcharge Visa or Mastercard credit cards in the same manner as and on the terms the merchant surcharges the competing card brand's credit cards.

e. American Express Surcharging Requirements

American Express generally prohibits a merchant from imposing any fee on an American Express credit card that is not imposed equally on all other payment products accepted by the merchant other than electronic fund transfers, cash and checks.

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f. Discover Surcharging Requirements

While Discover does not make its Card Brand Rules publicly available, Discover historically has permitted surcharging of Discover-branded cards so long as the surcharge does not discriminate against Discover-branded cards relative to the other card brands accepted by a merchant.

IV. Final summary

Surcharging is permitted by the card brands, subject to a merchant's compliance with the Card Brand Rules. Further, surcharging is legal at the federal level and in nearly all states. InterPayments tracks surcharging developments to offer a tailored solution to its clients that facilitates the assessment of surcharges in manner that is intended to help clients understand and comply with applicable laws and Card Brand Rules.

APPENDIX 1: State Anti-Surcharge Statute Details

State	No Surcharge Statute	Language of Statute	Legislative Intent/History	Litigation Challenge	Attorney General/State Regulator Action	State Legislature Action
California	Civil Code §1748.1	(a) No retailer in any sales, service, or lease transaction with a consumer may impose a surcharge on a cardholder who elects to use a credit card in lieu of payment by cash, check, or similar means. A retailer may, however, offer discounts for the purpose of inducing payment by cash, check, or other means not involving the use of a credit card, provided that the discount is offered to all prospective buyers. §1747.02: (d) "Cardholder" means a natural person	"It is the intent of the Legislature to promote the effective operation of the free market and protect consumers from deceptive price increases for goods and services by prohibiting credit card surcharges and encouraging the availability of discounts by those retailers who wish to offer a lower price for goods and services purchased by some form of payment other than credit card."	March 2015: Federal District Court rules the surcharge ban is unconstitutional as it violates commercial free speech. January 2018: U.S. Court of Appeals for the Ninth Circuit affirms, finding California's no-surcharge law violates commercial free speech as applied to the merchant plaintiffs.	The Attorney General of California has interpreted the holding of the January 2018 decision to mean the anti-surcharge law cannot not be enforced against the merchants that brought the case, but does not generally prohibit the law's enforcement.	

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State	No Surcharge Statute	Language of Statute	Legislative Intent/History	Litigation Challenge	Attorney General/State Regulator Action	State Legislature Action
Colorado	Consumer Credit Code §5-2-212 *Ban in effect through June 30, 2022	Surcharges on credit transactions – prohibition: Except as otherwise provided in sections 24-19.5-103(3) and 29-11.5-103(3), C.R.S., no seller or lessor in any sales or lease transaction or any company issuing credit or charge cards may impose a surcharge on a holder who elects to use a credit or charge card in lieu of payment by cash, check, or similar means. A surcharge is any additional amount imposed at the time of the sales or lease transaction by the merchant, seller, or lessor that increases the charge to the buyer or lessee for the privilege of using a credit or charge card. For purposes of this section, charge card includes those cards pursuant to which unpaid balances are payable on demand.	Purpose of the Code: (d) "To protect consumer buyers, lessees, and borrowers against unfair practices..." (f) "To conform the regulation of consumer credit transactions to the policies of the federal "Truth in Lending Act" and federal "Consumer Leasing Act" Memorandum from Office of the Attorney General for State of Colorado (From: UCCC, To: Retail Sales Businesses, Re: "Annual Notification Fee" that credit sellers and retail merchants that extend consumer credit as a "creditor" must annually file and pay UCCC notification – dated January 17, 2013): "A consumer credit sale contract is entered into by a creditor and an individual person, rather than an organization; is primarily for personal, family, or household purpose."			July 2021: State Bill 21-091, signed into law effective July 1, 2022, repeals prohibition of imposing credit card surcharge; and limits the maximum surcharge amount per transaction to: (i) an amount not to exceed 2% of the total cost of the transaction to the buyer, or (ii) an amount not to exceed the merchant discount fee that the merchant pays to its card processor to process the transaction. The bill prohibits surcharging debit cards.

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Connecticut	Connecticut General Statutes > Title 42 > Chapter 739 > §42-133ff	"No seller may impose a surcharge on a buyer who elects to use any method of payment, including, but not limited to, cash, check, credit card or electronic means, in any sales transaction."				
Florida	Fla. Stat. Ann. §501.0117(1) Chapter 501 is titled "Consumer Protection"	"A seller...may not impose a surcharge on the buyer...for electing to use a credit card in lieu of payment by cash, check, or similar means, if the seller...accepts payment by credit card..."	Title of Chapter which statute falls under is "Consumer Protection" Focus on term "buyer." No use of the term "cardholder," which is later defined under §501.0118, as including a person or organization. But did not use "cardholder" here in this statute so likely intended to make a distinction.	September 2014: Federal District Court upholds the no-surcharge statute. November 2015: U.S. Court of Appeals for the 11th Circuit vacates the decision of the District Court finding the statute is an unconstitutional violation of commercial free speech. September 2016: Supreme Court takes no action on the petition.		
Kansas	Kan. Stat. Ann. §16a-2-403 Chapter 16a: "Consumer Credit Code"	"No seller... or any credit card issuer may impose a surcharge on a card holder who elects to use a credit card in lieu of payment by cash, check or similar means."	Title of Chapter which statute falls under is "Consumer Credit Code" Scope of Statute: [Part 4] applies to consumer loans; consumer credit transactions	February 2021: District Court finds state's no-surcharge statute is unenforceable as applied to the plaintiff as it violates commercial free speech.		March 2021: The Kansas State Legislature is considering H.B. 2316, which would eliminate the prohibition of a surcharge when purchases are made with a credit or debit card.

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Maine	Maine Rev. Stat. Ann. tit. 9-A, §8-509 Title: 9-A: "Maine Consumer Credit Code"	"No seller...may impose a surcharge on a cardholder who elects to use a credit card in lieu of payment by cash, check or similar means."	Name of Title which statute falls under is "Consumer Credit Code" § 8-501 states that "Maine Consumer Credit Code" is referred to as "Truth in Lending." Also states that any term not defined under state statute will use definition from federal TILA. But note that TILA exempts credit transactions involving business purposes. Focus is on the consumer, which under TILA is defined as a "natural person" Regulation Z of TILA (12 C.F.R. § 226.1) defines cardholder as a "natural person"			
Massachusetts	Consumer Credit Cost Disclosure (Chapter 140D), §28A	(a)(1): "With respect to a credit card which may be used for extensions of credit in sales transactions in which the seller is a person other than the card issuer, the card issuer may not, by contract or otherwise, prohibit any such seller from offering a discount to a cardholder to induce the cardholder to pay cash, check or similar"	Uses same wording to define terms as Federal Truth in Lending Act. But the scope of TILA and that it is not applicable to credit transactions involving business purposes. Focus is on the consumer, which under TILA is defined as a "natural person." Regulation Z of TILA (12 C.F.R. § 226.1) defines cardholder as a "natural person."		January 2020: Division of Banks offers an opinion to a specific merchant setting forth criteria to evaluate the permissibility of merchants engaging third-party service providers to process customer credit card payments for a fee and noting the ongoing question of the constitutionality of credit card	July 2021: The Massachusetts State Legislature is considering H.B. 443, which would repeal the ban on credit card surcharges.

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State	No Surcharge Statute	Language of Statute	Legislative Intent/History	Litigation Challenge	Attorney General/State Regulator Action	State Legislature Action
		means rather than use a credit card. (2) No seller in any sales transaction may impose a surcharge on a cardholder who elects to use a credit card in lieu of payment by cash, check or similar means."			surcharge provisions.	
New York	General Business Law §518	"No seller in any sales transaction may impose a surcharge on a holder who elects to use a credit card in lieu of payment by cash, check, or similar means."		October 2013: Southern District of New York finds no-surcharge law unconstitutional as it violates commercial free speech. September 2015: U.S. Court of Appeals for the 2nd Circuit reverses decision of District Court. March 2017: U.S. Supreme Court rules no surcharge law impermissibly regulates commercial free speech and remands. December 2017: 2nd Circuit certifies to N.Y. Court of Appeals to answer specific question on no-surcharge law October 2018: N.Y. State Court of Appeals rules merchants are in accordance		February 2021: The New York State Legislature is considering legislation that would provide disclosure and notice requirements for surcharging and limit the maximum surcharge merchants could impose on customers to 4% of the total cost paid for the good or service. 2021 N.Y. S.B. 4035, 244th Legislative Session (Feb 2021); 2021 N.Y. S.B. 1394, 244th Legislative Session (Jan. 2021); and 2021 N.Y. A.B. 314, 244th Legislative Session (Jan. 2021).

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				with Section 518 when posting dollar-and-cents pricing model. January 2019: 2nd Circuit Court of Appeals approves N.Y. State Court of Appeals price differential rule.		
Oklahoma	Consumer Credit Code, Title 14A - §2-417	"No seller in any sales transaction may impose a surcharge on a cardholder who elects an open-end credit card or debit card account instead of paying by cash, check or similar means."	Same purpose of Code as set out in CO Consumer Credit Code except does not reference "Truth in Lending Act."		January 2020: Attorney General opined that the state's surcharging ban may be considered unconstitutional, but noted the advisory was not binding until determined by an action in district court.	

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Texas	Tex. Fin. Code Ann. §339.001(a)	"In a sale of goods or services, a seller may not impose a surcharge on a buyer who uses a credit card for an extension of credit instead of cash, a check, or a similar means of payment."	Brochure by Attorney General re "Questions about Credit Cards," stating "In Texas, a business cannot penalize consumers who pay for a good or service by using a credit card... However, businesses in Texas can discount the regular retail price of an item for consumers who pay cash instead of using a credit card. Consumers who are charged extra for using a credit card should report..." Last amended in 2005, adding subsection (c): "The Finance Commission of Texas shall have exclusive jurisdiction to enforce and adopt rules relating to this section. Rules adopted pursuant to this section shall be consistent with federal laws and regulations governing credit card transactions described by this section. This section does not create a cause of action against an individual for violation of this section."	February 2015: Federal District Court upholds the constitutionality of no-surcharge law. March 2016: U.S. Court of Appeals for the 5th Circuit affirms decision of District Court. April 2017: U.S. Supreme Court remands to follow ruling with New York law. August 2018: U.S. Court of Appeals for the Fifth Circuit affirms, Texas no-surcharge law as applied to the merchant plaintiffs violates commercial free speech.	June 2019: The State Attorney General advised that "circumstances may still exist where, as applied, [the anti-surcharge statute] operates to prohibit a credit card surcharge fee."	

APPENDIX 2: Visa and MasterCard Surcharging Disclosure Requirements

The Visa and MasterCard Card Brand Rules provide that the requirement for clear and prominent disclosure of any credit card surcharge to be assessed will be satisfied if consistent with the following table.

Transaction Type	Point-of-Entry	Point-of-Transaction
Face-to-Face Transaction	Main entrance(s) of the merchant location where the transaction is completed, in a minimum 32-point Arial font, but in any case no smaller or less prominent than surrounding text.	Every customer checkout or payment location, in a minimum 16-point Arial font, but in any case no smaller or less prominent than surrounding text.
Electronic Commerce Transaction	The first page that references credit card brands accepted, in a minimum 10-point Arial font, but in any case no smaller or less prominent than surrounding text.	Checkout page, in a minimum 10-point Arial font, but in any case no smaller or less prominent than surrounding text.
Mail Order Transaction	The first page of the catalog that references credit card brands accepted, in a minimum 8-point Arial font, but in any case no smaller or less prominent than surrounding text.	Mail order form, in a minimum 10-point Arial font, but in any case no smaller or less prominent than surrounding text.
Telephone Order Transaction	The first page of the catalog that references credit card brands accepted, in a minimum 8-point Arial font, but in any case no smaller or less prominent than surrounding text.	Verbal notice from the telephone order clerk, including the credit card surcharge amount.
Unattended Cardholder-Activated Terminal	Main entrance(s) of the merchant location where the transaction is completed (if applicable) (for example: gas station store) in a minimum 32-point Arial font, but in any case no smaller or less prominent than surrounding text.	On the unattended cardholder-activated terminal or virtual disclosure on the payment terminal screen, in a minimum 16-point Arial font, but in any case no smaller or less prominent than surrounding text.