

The States Credit Card Anti-Surcharge Legislation, Both Enacted and Proposed: Reason for the Supplier to Reconsider a Nationwide Surcharge Rollout?



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**THE STATES CREDIT CARD ANTI-SURCHARGE
LEGISLATION, BOTH ENACTED AND PROPOSED:
REASON FOR THE SUPPLIER TO RECONSIDER A
NATIONWIDE SURCHARGE ROLLOUT?**

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Introduction

In recent years, a trend that has become highly visible for suppliers in the B2B space is the increase in the numbers of customers using credit cards to pay B2B invoices (both existing and new customers). The reasons for this increase are manifold but include the perks uniquely associated with the use of a credit card: cards offer the only payment channel where the principal of the company receives personal benefits with card use (points and miles); and the corporate customer gets the card issuer float of additional time to pay the supplier's invoices through reimbursement of the cardholder's card statement.

Unfortunately for suppliers however, credit cards are the most expensive payment channel, due in large part to the interchange fees imposed by card companies that erode the profitability of the sale.

A Brief History of Card Surcharging

Historically, credit card companies' network rules prohibited suppliers and retailers from imposing the interchange fee on customers through a "surcharge". This contractual ban on surcharging resulted from a protracted decades-long debate on the topic. As far back as 1974, Congress enacted legislation protecting the right of merchants, including suppliers, to have dual-pricing systems, providing that "a 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 by cash, check, or similar means rather than use a credit card."

In 1976, after two years of lobbying Congress to impose its preferred speech code, the credit card industry succeeded in having Congress enact a temporary ban on surcharges, despite authorization for discounts. After meeting much opposition in the early 1980's from lobbying groups, Congress allowed the ban on surcharges to lapse in 1984.

Despite the lapse on the ban at the federal level, the credit card companies were successful in lobbying ten state legislators to enact anti-surcharge laws. In addition, the card companies counteracted the effect of the federal easing of restrictions by including contractual no-surcharge provisions in their merchant agreements.

These private no-surcharge rules came under scrutiny when, in 2004, several national retailers and trade associations (including Kroger, PayLess, Safeway) filed lawsuits against Visa and MasterCard, alleging that the card companies conspired to fix artificially-high interchange fees in violation of the Sherman Antitrust Act. The suits were later consolidated and certified as a class in the U.S. District Court for the Eastern District of New York. After eight years of class action litigation, the court gave final approval of the Visa and MasterCard class action settlement in December 2013.

The class action settlement amends Visa and MasterCard rules to allow merchants, including suppliers, to pass the interchange fee to card-paying customers to recoup this fee. Thus, in the forty states that have not passed anti-surcharge legislation, there now is no legal bar to surcharge credit card-paying customers, whether in the B2B or B2C space.

Although forty states now permit surcharging, the issue remains less resolved in the ten states in which anti-surcharge legislation was enacted. Ostensibly, the settlement does not affect the

ban on surcharging in these states; nonetheless, the legislative intent in many of these states was to protect consumers, and not to impact B2B relationships. Therefore, the specific language of each anti-surcharge law warrants closer examination to determine whether B2B surcharging is permissible. Further, in several of these states, contractual provisions are permitted that will allow business customers to waive the ban on surcharging in the transaction at issue.

Finally, the status of the constitutionality of the legislation is far from settled: two federal courts in states that enacted anti-surcharge laws (California and New York) have found the ban on surcharging to be unconstitutional, and this may expand.

In light of these developments, the following is a closer analysis of the surcharge ban in the ten states that adopted such legislation: California, Colorado, Connecticut, Florida, Kansas, Maine, Massachusetts, New York, Oklahoma and Texas.

State Anti-Surcharge Legislation

<p>California Cal. Civ. Code §1748.1 [2012]</p>
<p>Surcharge Ban: 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.</p> <p>Discounts Permissible: A retailer may, however, offer discounts to induce payment by cash, check or other means not involving a credit card, provided the discount is offered to all customers.</p>
<p>Defined Terms: “Retailer:” every person other than a card issuer who furnishes money, goods, services or anything else of value upon presentation of a credit card by a cardholder. “Retailer” shall not mean the state, a county, city and county, or any other public agency.</p> <p>“Cardholder” means a natural person to whom a credit card is issued for consumer credit purposes, or a natural person who has agreed with the card issuer to pay consumer credit obligations arising from the issuance of a credit card to another natural person.</p> <p>“Consumer” is not specifically defined in Civil Code Sections 17471748.1.</p>
<p>Legislative Intent/History: “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.”</p>
<p style="text-align: center;">Analysis:</p> <p>B2B Transactions? The definition of a “cardholder” - a “natural person” to whom a credit card is issued “for consumer credit purposes,” and excludes businesses.</p> <p>Are Personal Cardholders Paying B2B Invoices Included?</p> <p>The language for consumer credit purposes indicates that a personal cardholder paying a B2B invoice is outside the scope of the statute.</p> <p>Does the Law Apply to Convenience Fees? The statute does not define what constitutes a “surcharge,” so it is unclear as to whether it includes any additional fee (as other state statutes provide) added by a supplier in a B2B invoice.</p>

Status: On March 26, 2015, 1748.1 a federal district court found the law unconstitutional. That decision is on appeal to the Ninth Circuit and is not expected to be heard until sometime in 2016 at the earliest. Therefore, suppliers in California may assess a surcharge on credit card-paying customers.

Colorado

Consumer Credit Code §5-2-212 [2010]

Surcharge Ban: 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.

Discount Permissible: “A discount offered by a seller or lessor for the purpose of inducing payment by cash, check or other means not involving the use of a seller or lender credit card shall not constitute a finance charge if such discount is offered to all prospective buyers and its availability is disclosed to all prospective buyers clearly and conspicuously in accordance with regulations of the administrator.”

Legislative Intent/History: Purpose of the Code:

- “To protect consumer buyers, lessees, and borrowers against unfair practices...”
- “To conform the regulation of consumer credit transaction 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 (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.”

Analysis

B2B Transactions? Even though the word “holder” is broad and may include both consumers and businesses, the statute’s stated purpose and inclusion in the “Consumer Credit Code” support that B2B transactions are outside the scope of the statute. This interpretation is supported by the Attorney General’s memorandum.

Are Personal Cardholders Paying B2B Invoices Included?

“Consumer Credit Sales” as defined within the chapter, exclude those transactions made for a “business, investment, commercial purpose.” Additionally, a stated purpose of the statute is to conform to TILA, which also excludes transactions made for a business purpose.

Does the Law Apply to Convenience Fees? The statute defines “surcharge” as “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 credit or charge card.” The language “any additional amount imposed” encompasses surcharge and convenience fees.

Contractual Waiver: A party benefitting from rights or benefits conferred by statute is “free to voluntarily waive its benefits” unless the statute also serves to protect the interests of the public as a whole. *Francam Bldg. Corp. v. Fail*, 646 P.2d 345, 348–49 (Colo.1982). Courts must be cautious in finding contract provisions void because to do so would be to infringe on an essential freedom. *Id.*

Therefore, in Colorado, it is likely a supplier can include a waiver in its card payment agreement form in which the business customer agrees to waive the ban on surcharging as a condition to use the card to pay the B2B invoice.

Connecticut
Conn. Gen. Stat. 42-133ff [2008]

Surcharge Ban: 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.

Discount Permissible: “Nothing in this section shall prohibit any seller from offering a discount to a buyer to induce such buyer to pay by cash, debit card, check or similar means rather than by credit card.”

Defined Terms: None.

Legislative Intent/History: None.

Analysis:

B2B Transactions? The word “buyer” seems to include consumers and businesses, and without legislative intent to the contrary, it may be argued that B2B transactions may fall within the scope of the Connecticut statute.

Are Personal Cardholders Paying B2B Invoices Included? For the reasons that B2B transactions may be included, it may be argued that a B2B transaction involving a personal cardholder may also be included.

Does the Law Apply to Convenience Fees? Unlike other state anti-surcharge laws, this law does not define what constitutes a surcharge. The plain language of the statute seems to exclude convenience fees.

Contractual Waiver: Where the language of an agreement was clear and definitive, and the intention of the parties unmistakable, parties have been permitted a voluntary and absolute waiver of statutory rights. *Pero Bldg. Co. v. Smith* 6 Conn. App. 180, 185, 540 A. 2d 524, 527 (1986).

Therefore, in Connecticut a supplier can include a waiver in its card payment agreement form in which the business customer agrees to waive the ban on surcharging as a condition to use the card to pay the B2B invoice.

Florida
Fla. Stat. §501.0117; Chapter Title: “Consumer Protection” [2010]

Surcharge Ban: A seller or lessor in a sales or lease transaction may not impose a surcharge on the buyer or lease for electing to use a credit card in lieu of payment by cash, check, or similar means, if the seller or lessor accepts payment by credit card.

Discounts Permissible: “This section does not apply to the offering of a discount for the purpose of inducing payment by cash, check, or other means not involving the use of a credit card, if the discount is offered to all prospective customers.”

Defined Terms: “Surcharge:” any additional amount imposed at the time of a sale or lease transaction by the seller or lessor that increases the charge to the buyer or lease for the privilege of using a credit card to make payment.
“Cardholder” is defined as a “person or organization named on the face of a payment card to whom or for whose benefit the payment card is issued.”

Legislative Intent/History: The House Commerce Committee’s Staff Analysis indicates the bill’s passage was based on the support of the Florida Consumers Federation, a consumer lobbying organization. The Federation’s position was that the bill “is the only way to assure basic consumer protection for both the citizens of Florida and the tourists who frequent this state.”

Analysis:

B2B Transactions? Even though the term buyer may be interpreted to include a business, the statute is focused on protecting the consumer. The statute is contained in the “Consumer Protection” chapter, and the legislative history of the bill supports this.

Are Personal Cardholders Paying B2B Invoices Included? For the reasons that B2B transactions appear to be excluded from the law, a B2B transaction involving a personal cardholder also appears outside the scope of the law.

Does the Law Apply to Convenience Fees? The statute defines a surcharge as “any additional amount imposed at the time of a sale or lease transaction by the seller or lessor that increases the charge to the buyer or lease for the privilege of using a credit card to make payment.” The language “any additional amount imposed” seems to include a convenience fee.

Status: On September 2, 2014, a federal judge ruled the anti-surcharge law was constitutional. That decision is under appeal.

Contractual Waiver: “It is well-settled that contractual waivers are enforceable under Florida law for any types of rights.” *Gessa v. Manor Care of Florida, Inc.*, 86 So. 3d 484, 499 (Fla. 2011). *See also, Bellaire Secs Corp. v. Brown*, 124 Fla. 47, 168, So. 625, 639 (1936)(“A party may waive any right to which he is legally entitled, whether secured by contract, conferred by statute, or guaranteed by the Constitution.”)

Therefore, in Florida, a supplier can incorporate a provision in its card payment agreement whereby customers waive the ban on surcharging as a condition to use the card to pay the B2B invoice.

Kansas

K.S.A. §16a-2-403; Chapter Title: “Consumer Credit Code” [2010]

Surcharge Ban: No seller or lessor in any sales or lease transaction or any credit or debit card issuer may impose a surcharge on a card holder who elects to use a credit or debit card in lieu of payment by cash, check or similar means.

Discounts Permissible: Although the Kansas statute does not specifically allow for discounts for other methods of payment, such as check or ACH, as do most of the other statutes, a 1986 attorney general opinion provides that such discounts do violate the statute.

Defined Terms: “Surcharge:” 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 debit card.

Legislative Intent/History: Scope of Statute: “Parts 3 and 4 apply to consumer loans, including loans made by supervised lenders.”

Analysis:

B2B Transactions? The use of the word “card holder” seems broad enough to cover consumers and businesses, and is not defined within the statute. However, given that the statute is located within the “Consumer Credit Code” and the statute is intended to apply to “consumer loans,” it appears the statute’s intent relates to cards in the B2C space, not B2B.

Are Personal Cardholders Paying B2B Invoices Included? For the reasons that B2B transactions appear to be excluded from the law, a B2B transaction involving a personal cardholder appears outside the scope of the law.

Does the Law Apply to Convenience Fees? The statute defines a surcharge as “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 debit card.” The language “any additional amount imposed” seems to include a convenience fee.

Maine

9-A M.R.S. §8-509; Chapter Titled “Maine Consumer Credit Code” [2011]

Surcharge Ban: A seller in a sales transaction may not impose a surcharge on a cardholder who elects to use a credit card or debit card in lieu of payment by cash, check or similar means.

Discounts Permissible: “A discount or reduction from the regular price is not a surcharge.”

Defined Terms: “Surcharge:” any means of increasing the regular price to a cardholder that is not imposed on a customer paying by cash, check or similar means.

§8-501 states that any term not defined under state statute will use definition from federal TILA. TILA §104 (1) Exempted Transactions: Credit transactions involving extensions of credit primarily for business, commercial, or agricultural purposes, or to government or governmental agencies or instrumentalities, or to organizations.

Legislative Intent/History: §8-501 states that “Maine Consumer Credit Code” is referred to as “Truth in Lending.”

Analysis:

B2B Transactions? While the term “cardholder” is relatively broad and may include consumers and businesses, the statute’s location in the “Consumer Credit Code” and reference to TILA indicates that it is aimed at consumer protection and not B2B transactions.

Are Personal Cardholders Paying B2B Invoices Included? Because the statute follows TILA, which expressly excludes a transaction made for a business purpose, it appears that a transaction made for a business purpose, whether by personal or corporate card, falls outside the scope of the statute.

Does the Law Apply to Convenience Fees? The statute defines surcharge as “any means of increasing the regular price to a cardholder that is not imposed on a customer paying by cash, check or similar means. The language “any means of increasing the regular price” seems to include a convenience fee.

Contractual Waiver:

Where a statutory right is involved, the law of this circuit is that “a waiver should be express, and that a mere inference, no matter how strong, should be insufficient.” Perkins Machine Co., supra, 326 F.2d at 489.

The doctrine of waiver when applied to constitutional or statutory rights necessitates in this day more than the mere failure to claim one's rights but rather connotes a free, deliberate and understanding foregoing of one's known rights. Green v. State, 245 A.2d 147, 149 (Me.) supplemented, 247 A.2d 117 (Me. 1968)

Massachusetts

ALM GL Ch. 140D, §28A; Chapter Titled “Consumer Credit Cost Disclosure” [Enacted 2013]

Surcharge Ban: 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.

Discounts Permissible: 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 means rather than use a credit card.

Defined Terms: Statute uses the same wording to define terms as TILA.

Legislative Intent/History: None.

Analysis:

B2B Transactions? The statute uses the same language to define terms as the federal TILA. TILA explicitly excludes transactions involving “business purposes.” Further, the statute is located in the “Consumer Credit Cost Disclosure” chapter, indicating that the statute’s focus is consumer protection.

Are Personal Cardholders Paying B2B Invoices Included? Because the statute appears to coincide with TILA, it seems a transaction conducted for a business purpose, whether by personal or corporate card, falls outside the scope of the statute.

Does the Law Apply to Convenience Fees? The Massachusetts’s Office of Commission of Banks has issued a written opinion that states convenience fees violate the state’s anti-surcharge law.

Contractual Waiver: A statutory right or remedy may be waived when the waiver would not frustrate the public policies of the statute. For example, in *Continental Corp. v. Gowdy*, 283 Mass. 204, 186 N.E. 244 1933), we stated that a contractual waiver of statutory rights is permissible when the statute's purpose is the “protection of the property rights of individual parties ... rather than ... the protection of the general public.” *Canal Elec. Co. v. Westinghouse Elec. Corp.*, 406 Mass. 369, 377-78, 548 N.E.2d 182, 187 (1990).

Therefore, in Massachusetts, a contractual waiver of the ban against surcharging may be permissible if it is considered not to frustrate the public policy of the state. In the B2B space, a waiver in the supplier’s card agreement form as a condition to use the card to pay the invoice is unlikely to be considered a violation of Massachusetts public policy.

<p>Oklahoma</p> <p>1. §2-417; §2-211 of Chapter Title “Consumer Credit Code”</p>
<p>Surcharge Ban: 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.</p>
<p>Discount Permissible: 2-211: With respect to all sales transactions, a discount which a seller offers, allows or otherwise makes available for the purpose of inducing payment by cash, check or similar means rather than by use of an open-end credit card account shall not constitute a credit service charge... There is no limit on the discount which may be offered by the seller.</p>
<p>Defined Terms: None.</p>
<p>Legislative Intent/History: Sets out same purpose as referenced in Colorado’s Consumer Credit Code, but without reference to TILA.</p>
<p>Analysis</p>
<p>B2B Transactions? Given the statute’s inclusion in the “Consumer Credit Code” and purpose, it appears that the statute’s focus is on consumer protection. Indeed, this view is supported by an official opinion of the State of Oklahoma Attorney General, dated June 2, 2010, which found that the “prohibition against seller-imposed surcharges on cardholders who elect to use a credit card as a form of payment in lieu of payment by cash, check or similar means, provided in 14A O.S. 2001 § 2-417 of the UCCC, applies to consumer credit sales only.”</p> <p>However, the opposing view is that the Attorney General’s opinion violates the basic rule that legislative intent is the cardinal rule of statutory construction as applying it to consumer sales only ignores the very situation that gave rise to the prohibition.</p> <p>Are Personal Cardholders Paying B2B Invoices Included? Because the statute’s focus is consumer protection, any transaction made for a business purpose, whether by personal or corporate card, seems to fall outside the scope of the statute.</p> <p>Does the Law Apply to Convenience Fees? The statute does not define what constitutes a surcharge, so it is unclear whether it includes any additional fee [as other statutes provide] added by a vendor to a card transaction.</p>
<p>Contractual Waiver: While we agree that a right may be waived whether conferred by law or contract, when a <i>statute</i> contains provisions that are founded upon public policy, such provisions cannot be waived by a private party if such waiver thwarts the legislative policy which the statute was designed to effectuate. Courts must give effect to legislative acts and may not amend, repeal or circumvent them. <i>Isenhower v. Isenhower</i>, 666 P.2d 238 (Okla.Ct.App.1983).</p> <p>As the legislative policy is designed to protect consumers, it is likely that in Oklahoma, a contractual waiver of the surcharge ban in a B2B card payment agreement form as a condition to paying the invoice will be enforced.</p>

<p>New York</p> <p>N.Y. General Business Law §518</p>
<p>Surcharge Ban: 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.</p>

Discounts Permissible: “With respect to 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 by cash, check or similar means rather than use a credit card.”

Defined Terms: None.

Legislative Intent/History: None.

Analysis:

B2B Transactions? The plain language of the statute is broad, and provides no definition of “holder” or “sales transaction.” Further, nothing in General Business Law §518 or its legislative history indicates that the Legislature intended to limit the statute’s application to B2C, and therefore B2B may appear to fall within the scope of the statute.

Are Personal Cardholders Paying B2B Invoices Included? For the reasons that B2B transactions appear to fall within the scope of the statute, it would seem that personal cardholder transactions, although made for a business purpose, may fall within the scope of the statute.

Does the Law Apply to Convenience Fees? The statute fails to define what constitutes a “surcharge,” so the plain language of the statute could be interpreted to mean that convenience fees are not within the scope of the statute.

Status: On October 3, 2013, a federal judge in the Southern District of New York ruled that this statute was unconstitutional. That decision is under appeal and arguments have been heard in the Second Circuit. A decision is expected at any point.

In the interim, surcharging is permitted in New York.

Texas

Tex. Finance Code § 339.001 [Enacted 2005]

Surcharge Ban: 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.

Defined Terms: None.

Legislative Intent/History: Part (d) of the statute provides: “Rules adopted pursuant to this section shall be consistent with federal laws and regulations governing credit card transactions described by this section.”

Analysis:

B2B Transactions? The word “buyer” seems to include consumers and businesses. However, the statute’s statement that “[r]ules adopted pursuant to this section shall be consistent with federal laws” appears to reference TILA, which excludes transactions conducted for a business purpose.

Are Personal Cardholders Paying B2B Invoices Included? For the same reason it is unclear whether B2B transactions are within the scope of the statute, it is also unclear whether transactions made by personal cardholders fall within the statute.

Status: On February 4, 2015, a federal judge held the statute was constitutional. That decision is on appeal.

Contractual Waiver: Absent a statute or fundamental public policy precluding waiver, a party may contractually waive even constitutional or statutory rights, whether present or future. *Wright v. Sport Supply Grp., Inc.*, 137 S.W.3d 289, 294 (Tex.App.-Beaumont 2004, no pet.)

Therefore in Texas, a supplier may be able to include a waiver in its card payment agreement form in which the business customer agrees to waive the ban on surcharging as a condition to use the card to pay the B2B invoice.

Current Litigation

The first challenge to the constitutionality of the state anti-surcharge laws was brought in New York. On June 4, 2013, five retailers filed a lawsuit in the Southern District of New York challenging the constitutionality of the anti-surcharge statute. (*Expressions Hair Design v. Schneiderman*). The plaintiffs alleged that the anti-surcharge statute violates their First Amendment right to commercial free speech and is unconstitutionally vague.

In October of that year, Judge Rakoff of the Southern District agreed with the plaintiffs and held that the law was unconstitutional. An appeal of that decision was brought before the Second Circuit and oral arguments were heard in March, 2015. It is possible that a decision may be issued by the Second Circuit by the end of summer 2015.

Following the success of the New York challenge, similar challenges were launched in California, Florida and Texas to mixed results. On March 26, 2015, a federal court in California found its legislation to be a content-based restriction on commercial speech in a decision that was markedly similar to the decision of the New York district court. The Attorney General for California has appealed, but arguments are not expected to be heard before the Ninth Circuit for a considerable time. (*Italian Colors v. Harris*).

On the other hand, almost identical constitutional challenges in Florida and Texas both failed and the equivalent legislation was upheld in both states (respectively, *Dana's Railroad Supply v. Bondi*; *Rowell et al. v. Pettijohn*). Again, both cases are on appeal and a decision from the Eleventh Circuit on the Florida decision may be forthcoming in 2015.

Legislative Proposals

In addition to the ten states that previously adopted anti-surcharge legislation, in the wake of the class action settlement agreement, state legislatures rushed to consider whether they should enact anti-surcharge legislation to protect residents from surcharging within their states. Indeed, anti-surcharge legislative proposals of some variety were introduced in over eighteen states. However, it quickly became apparent to the state legislators that such legislation may not be required given that national retailers and convenience stores vowed not to exercise the freshly minted right to surcharge.

In January 2013, a spokesman for Walmart noted that the “proposed modification to the no-surcharging rule for Visa and MasterCard provides no benefit to customers or merchants such as Walmart” (email to Bloomberg of January 28, 2013). In the same week, Target and Macy's both announced they would not be introducing surcharges. The national retailers' election not to surcharge was economic: they believed consumers would take their business to retailers that did not surcharge. The lack of national retailer support to surcharge the consumer saw the initial push for legislative action recede.

The table charts the introduction and status of anti-surcharge legislation.

State Anti-Surcharge Proposals

State	Date Proposal Introduced	Status
Hawaii	January 18, 2013	February 2014, Committee on Commerce and Consumer Protection deferred the measure
Illinois	January 21, 2013	December 3, 2014, adjourned indefinitely
Kentucky	February 6, 2013 House February 19, 2013 Senate	Proposal adjourned indefinitely
Maryland	February 8, 2013	Hearing February 22, 2013. "Died in committee" i.e., defeated, February 22, 2013
Michigan	February 14, 2013	Referred to Committee on Commerce/Banking and Financial Institutions, February 2013, no further action
Missouri	February 7, 2013	Public hearing March 2013, bill not currently on legislature calendar
Nevada	March 8, 2013	Sent to Committee on Commerce and Labor; pursuant to Joint Standing Rule, no further action allowed, April 2013
New Hampshire	February 20, 2013	October 30, 2014, Interim study report: Not recommended for future legislation
New Jersey	February 4, 2013	February 7, 2013, defeated in chamber
New Mexico	February 12, 2013	Referred to Judiciary Committee February 28, 2013, adopted by House March 1, 2013. No further action taken. Reported as "died" on NM Legislature 2013
Pennsylvania	February 14, 2013	Referred to Consumer Affairs Committee, February 14, 2013. "Died in Committee" i.e., was not referred to and no further action taken
Rhode Island	January 31, 2013	February 15, 2013, Committee recommended measure be held for further study. No further action
South Carolina	February 5, 2013	February 5, 2013, referred to Committee on Labor, Commerce and Industry. No further action
Tennessee	February 5, 2013	Taken off Notice – Insurance and Banking Subcommittee, March 20, 2013
Vermont	February 7, 2013	Referred to Committee on Judiciary. No further action
West Virginia	March 12, 2013	Last action: Sent to Banking and Insurance March 12, 2013
Wisconsin	June 6, 2013	April 8, 2014, Failed to pass Assembly

As is apparent from the foregoing table, the state proposals are not progressing and currently no state is considering a proposal to ban the surcharging of credit cards at state-level.

Final Analysis: What Does this Mean for Suppliers' Ability to Surcharge Nationwide?

As has been seen, from the effective date of the antitrust settlement in 2013, a supplier had the right to surcharge its customers.

Nonetheless, rolling out a surcharge program is not without its restrictions. First, the surcharge must equal the actual cost of processing the credit card transaction (typically between 1.5 and 3 percent), but may not exceed 4 percent of the purchase. The surcharge may also vary based on the type of card; for example, federal law prevents suppliers from surcharging debit card transactions.

In addition, US suppliers may only surcharge Visa and MasterCard credit cards if the supplier is able to add a surcharge fee on other non-Visa/MasterCard credit cards that it accepts in a channel of commerce or adds such a surcharge at an amount equal or lesser to the competing network's cost to the supplier. In other words, suppliers surcharging customers must do so consistently without discrimination.

In order to begin surcharging, suppliers must also notify Visa and MasterCard as well as their acquirer at least thirty days in advance. Furthermore, the supplier must satisfy procedural requirements and must notify customers at the point of entry, the point of sale, and on the invoice.

Despite these restrictions, the 2013 Settlement has permitted suppliers to offset the exorbitant costs of processing credit card transactions by passing this expense to the customer. The customer has the option at that point to elect to accept the surcharge or to pay by another less expensive means, such as ACH. In this light, the developments on surcharging have been a considerable benefit to suppliers processing cards.

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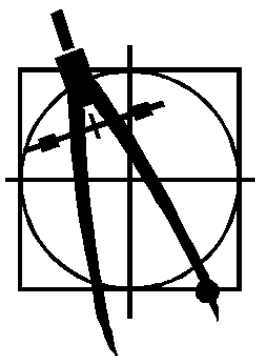
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Credit Research Foundation

RESOURCES

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