B2B Credit Card Update

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Credit cards have become the dominant method of payment in consumer transactions, with studies showing only 9 percent of Americans use cash as their primary form of payment.[1] That trend is making its way into business-to-business (B2B) payments to an ever-increasing degree. Although convenient—and in many instances necessary—as a method of payment, credit cards are also the most expensive method of payment for a merchant to accept. The costs of accepting credit cards, commonly referred to as swipe fees, comprise an alphabet soup of charges imposed at each step of the card payment process. That panoply of fees typically ranges from 2 percent to 5 percent of the payment amount, which can make a significant impact on the merchant's bottom line, especially in an inflationary environment. This leaves merchants between a rock and a hard place: *How can they prevent credit card swipe fees from eroding their margins while still remaining competitive in the marketplace?*

The simplest solution (at least in theory) is to add a surcharge to credit card transactions to recover some or all of the associated swipe fees. Following a settlement of antitrust litigation against Visa and Mastercard in 2012 and a series of court decisions invalidating various state laws prohibiting merchants from imposing a surcharge on credit card payments, merchants in the retail arena have begun doing just that. Other options include cash discounts, convenience fees, and dual pricing (listing separate prices for cash and credit card sales), but merchants must be mindful of the ever-changing regulatory landscape governing these mechanisms.

For a short time, surcharging was regulated by federal law. Since 1984, however, such regulation has been left to a patchwork of state laws. As discussed below, state surcharge regulations remain in effect in a handful of states. States may take different approaches with respect to (i) whether surcharging is permissible, (ii) what constitutes a surcharge, (iii) how a surcharge must be communicated to the customer, and (iv) whether merchants can use dual pricing or cash discounts as an alternative to surcharging.

In a 2017 case, *Expressions Hair Design v. Schneiderman*,[2] the U.S. Supreme Court held that a New York statute that prohibited credit card surcharges but permitted dual pricing impacted merchants' First Amendment rights as a regulation of commercial speech. However, the appellate court below, the U.S. Court of Appeals for the Second Circuit, had not sought an opinion from the Court of Appeals of New York (New York's highest court) as to the actual meaning of the challenged statute.

On remand, the Second Circuit certified a question to the Court of Appeals of New York: "Does a merchant comply with New York's General Business Law § 518 so long as the merchant posts the total dollars and cents price charged to credit card users?" The state court answered that question in the affirmative—i.e., that a merchant complies with the New York statute "if and only if" it uses dual pricing and lists "the total dollars and cents price charged to credit card users." The court explained that under a dual-pricing regime, credit card users "see the highest possible price they must pay for credit card use and the legislative concerns about luring or misleading customers by use of a low price available only for cash purchases are alleviated."[3] The court concluded that the New York statute prohibited a "single-sticker pricing scheme" in which merchants list the cash price and indicate that a certain percentage or additional flat fee will be charged for credit card purchases, requiring consumers to "engage in an arithmetical calculation[.]"

Following a series of procedural contortions in a litigation that lasted over six years, the plaintiffs in *Expressions* eventually abandoned their case while the appeal was pending in the Second Circuit on remand, jointly moving with the New York attorney general to dismiss the appeal and to vacate the order of the

1 Becky Pokora, *Credit Card Statistics and Trends 2023*, Forbes Advisor (Mar. 9, 2023), *available at* https://www.forbes.com/advisor/credit-cards/credit-card-statistics/.

2 581 U.S. 37 (2017).

3 *Expressions Hair Design v. Schneiderman*, 32 N.Y. 3d 382, 393 (N.Y. App. 2018).

District Court below finding the state statute unconstitutional. As a result, New York's statute has been left in limbo (albeit with the overlay of a finding that it is a regulation of commercial speech). In 2020, the New York State Division of Consumer Protection issued an alert indicating that the state intends to resume enforcement of § 518, but specifically in the consumer context.[4]

Since the Supreme Court's decision in *Expressions*, surcharge prohibitions in many states have been amended by state legislatures or held invalid by courts, and several state attorneys general have declared their states' laws unconstitutional and declined enforcement. However, three statutes prohibiting surcharge remain. In Connecticut, Maine, and Massachusetts,[5] surcharges remain prohibited while cash discounts are permissible. In Connecticut, for example, a merchant can be fined $500 *per violation* of the surcharge prohibition. It is critical that merchants continue to monitor surcharge regulations as they evolve. From there, merchants can work with counsel to fine-tune their terms and conditions to leverage surcharge-friendly state laws to apply to their transactions.[6] The use of contract terms to designate a particular surcharge-friendly state as the situs of credit card payments, and to provide that the laws of that state govern any disputes related to credit card payments, is a common practice. However, to date, that practice has not been tested in court in a reported decision. Readers should work with in-house or outside counsel to understand the risks inherent in this approach and to craft contract terms appropriate to their situation.

In surcharge-friendly states, merchants must still carefully abide by certain requirements imposed by card network rules and, in some instances, by state statute. First, the surcharge must be disclosed at *both* the point of entry and the point of sale. In the context of a restaurant, for example, the surcharge must be disclosed on both the menu and the bill. In addition, the surcharge must be itemized on the bill or invoice. The same is true in the B2B context, including any online payment portal or e-commerce website.

Merchants must also abide by certain requirements of the individual card networks, which require merchants to notify the networks in writing, by completing a simple form, at least 30 days before beginning to surcharge transactions.[7] Certain credit card networks also direct that customers presenting their cards cannot be treated differently from those using other credit card brands.

A surcharge can be a flat fee across all transactions, or it can be a percentage of the price of the purchase. However, a surcharge for Mastercard or Visa credit card transactions cannot exceed *the lesser* of a cap established by the card networks (4% for Mastercard, 3% for Visa) or the actual cost of acceptance to the merchant over a one- or 12-month lookback period. Federal law prohibits surcharging debit card transactions.

Another means of recouping part of the cost of card acceptance is a convenience fee—a fee charged for all payments made through an alternative payment channel, such as an online payment portal. Convenience fees are not permitted for credit card transactions made with a physical card ("card present" transactions). Convenience fees can be charged across all forms of payment, rather than just credit cards, although certain credit card brands place restrictions on convenience fees. However, a convenience fee must be a fixed amount rather than a percentage of the sale. In the B2B context, where transaction amounts are typically larger than in consumer transactions (and can vary significantly from customer to customer), this requirement makes convenience fees less useful.

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4 Consumer Alert: NYS Division of Consumer Protection Alerts Consumers to NY Law Related to Credit and Debit Card Surcharges, Dec. 8, 2020, *available at* https://dos.ny.gov/news/consumer-alert-nys-division-consumer-protection-alerts-consumers-ny-law-related-credit-and.

5 While surcharges remain prohibited in Massachusetts, convenience fees are permissible if certain conditions are met. *See* Opinion 21-005: Convenience Fee (Apr. 12, 2022), *available at* https://www.mass.gov/opinion/opinion-21-005-convenience-fee.

6 This article is not legal advice or a legal opinion.

7 Mastercard: https://www.mastercard.us/en-us/surcharge-disclosure-webform.html.
Visa: Notification is now given through your card acquirer.
Discover: Notification is given through your card acquirer and to Discover on a form available from your acquirer.

In addition to state statutes and requirements of credit card companies, merchants must also be careful not to violate the Robinson-Patman Act of 1936, which makes it unlawful to sell commodity goods in like quantities to two different customers at two different prices with the effect of lessening competition. Violations of the Robinson-Patman Act carry civil liability as well as possible criminal penalties and are potentially actionable by competitors even without federal intervention. Open, and fact-specific, questions must be considered regarding what constitutes "lessening competition" and whether any defenses—such as a cost justification or a meeting competition defense—apply.

The decision of whether, and how much, to surcharge will be largely dependent on the merchant's business, the goods sold, the quantities the goods are sold in, and the merchant's customers, in addition to the legal considerations discussed herein. There is no one-size-fits-all solution. However, it is possible for merchants to strike the right balance to maintain their competitive pricing while not sacrificing their bottom line.

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