SQUIRE PATTON BOGGS

Payment Card Processing Trends: Merchant Surcharging to Offset Interchange Costs

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US merchants are cautiously optimistic that a federal district court's decision in *Corner Post* will pave the way for lower debit card interchange costs.[1] As the courts decide the fate of debit card interchange, many merchants are quietly embracing credit card surcharges as a way to offset interchange costs on credit card transactions.

Merchants implementing a credit card surcharge program, however, must account for disparate states' laws and complex payment card networks' operating regulations that govern how, and when a merchant can surcharge. Some merchants are relying on surcharge software providers and application programming interfaces (APIs) that automate a compliant surcharging program across multiple states, as well as on several different payment card networks. Surcharging software can be extremely effective if the surcharging program is designed properly and the agreement between the merchant and the provider properly allocates compliance responsibilities, protects the merchant with strong indemnifications and requires the provider to maintain a robust regulatory change management program.

Historically, federal law prohibited a merchant from surcharging a credit card, but the federal ban lapsed in 1984. More recently, certain payment card networks had operating regulations that prohibited merchants from surcharging credit card transactions. Those network prohibitions, however, were also eliminated as part of a class action settlement in 2013 with a group of merchants. After the 2013 change to the payment networks' operating regulations, merchants were reluctant to adopt surcharges for the fear of alienating end users; merchants prioritized patronage and transaction volumes over interchange expense management. Furthermore, some merchants were deterred by state laws that prohibited or limited credit card surcharging. But years of stubborn post-pandemic inflation and a costly global trade war have tipped the scales in favor of aggressively cutting operational costs. The flood gates have opened on credit card surcharges. Payment-card accepting merchants of all types, large and small, are rapidly implementing credit card surcharges, including for large-ticket business-to-business and commercial transactions where end users routinely settle six-figure invoices with a payment card.

A surcharge program can help a merchant recoup credit card interchange costs from the end user, but the absence of a federal surcharging standard has led to complex compliance requirements. Credit card surcharges are governed by a balkanized regime of disparate state laws in combination with stringent payment card network rules.

The payment card networks' operating regulations act as minimum compliance standards for all surcharging transactions, and even apply in states that have no surcharging limitations. And when a state has a surcharging law that is more restrictive than the payment card networks' rules, then the merchant must follow those stricter state laws. Merchants operating across large geographic footprints are frequently managing myriad state surcharging laws in addition to payment card network operating regulations for each brand.

For example, the payment card networks impose surcharge caps based on a merchant's average credit card processing costs, as calculated either over the preceding 12 months or during the merchant's prior statement period. Calculating a merchant's average credit card processing costs is not straightforward: the average credit card processing costs must be segregated by each payment card brand (as opposed to the merchant's global processing costs) and a merchant's credit card processing expenses typically include more than just interchange costs. The payment card networks also have strict parity rules that prevent a merchant from favoring one payment network over another based on more favorable surcharge caps at one network versus another. Furthermore, in some circumstances, the operating regulations for one payment card network are incongruous with the operating regulations for another network, *e.g.*, some networks prohibit a surcharge on debit cards, gift cards and prepaid cards, whereas other networks only allow surcharging if it applies equally to credit and debit cards. The payment card networks also require that credit card surcharges are: (i) processed in the same transaction as the sale; (ii) shown as a separate line item on the end user's invoice; and (iii) disclosed to the end user prior to processing the transaction.

1 In 2024, the Supreme Court held in *Corner Post, Inc. v. Board of Governors of the Federal Reserve System* that the statute of limitations under the Administrative Procedures Act accrues when a party is harmed, rather than when an agency promulgates a regulation, thereby permitting a merchant to challenge the Federal Reserve's 2011 Regulation II. On August 6, 2025, after the Supreme Court remanded the case, the district court concluded that the Federal Reserve exceeded its authority by interpreting the Durbin Amendment – as reflected in Regulation II – to allow card issuing banks to consider additional costs, including IT infrastructure and fraud mitigation measures, in debit card processing rates charged to merchants. The district court vacated Regulation II and stayed its vacatur pending the Federal Reserve's appeal to the Eighth Circuit.

Many states have surcharging restrictions that are similar to the payment card networks', but the state restrictions come with varying standards on key issues, *e.g.,* surcharge caps, transaction processing requirements and disclosure standards, *etc.* For example, Colorado and Minnesota permit credit card surcharges subject to a percentage cap and other states have particularized disclosure requirements prior to allowing a surcharge, *e.g.,* Kansas, New Jersey and New York. Further, Connecticut, Maine, Massachusetts, Oklahoma and Puerto Rico broadly ban credit card surcharges.[2]

State surcharging laws are also extremely fluid, and several state surcharging laws have been struck down by the courts. States with surcharging bans promote strong consumer protections, but merchants and other interested stakeholders have successfully persuaded courts that those bans violate the merchants' commercial free speech. California, Florida and Texas each have statutes that prohibit credit card surcharges, but courts have held that those states' laws violate the First Amendment. In these states, it is possible that the states' legislatures may seek to revise the surcharging laws in an attempt to survive a judicial challenge. Courts and state legislators are engaged in a push-and-pull on surcharging laws and the dust has yet to settle. Merchants seeking to implement a credit card surcharging program must be diligent in a dynamic regulatory environment and monitor changes to state laws, as well as payment network operating regulations.

As state laws and payment card network rules continue to evolve, several payment service providers are offering seamless surcharging APIs that operate alongside a merchant's existing payment processing platform to integrate and automate surcharging. Typical surcharging software includes features that can automatically detect the type of payment card and the location of the transaction to apply the appropriate surcharging restrictions. Surcharging software can help a merchant navigate an ever-changing landscape of state surcharging laws and payment card network rules; however, the program must be designed to be sustainable and adaptable and the contract between the parties should have a clear allocation of responsibilities and liabilities.

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2 Oklahoma lifted its surcharge ban, effective November 1, 2025.

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