

United States Surcharging Legal and Regulatory Overview

June 2024

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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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%) before April 15, 2023 - and three percent (3%) on and after April 15, 2023 - 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	<p>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</p> <p>The maximum surcharge amount must never exceed the merchant's cost of credit card processing</p>	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

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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

InterPayments prohibits US surcharges in Maine, Connecticut, New York, and U.S. Territories; it prohibits Canadian surcharges in Quebec.

Currently, Maine and Connecticut are the only two 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.

U.S. Territories, including Puerto Rico, Guam, American Samoa, U.S. Virgin Islands, and Northern Marianas Islands, also prohibit surcharging.

New York: New York effectively prohibits surcharging as of February 11, 2024. New York enacted a surcharge statute which prohibits merchants from adding a fee to a posted price. The posted price must be the highest price a customer will ever pay and must include the surcharge amount in the posted price. For example, there can be a posted price of \$103 and a cash price of \$100. But merchants can no longer charge a merchant \$100 and add a \$3 surcharge.

Colorado: 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 became effective on July 1, 2022. For interchange plus merchants, the cost of each card can vary dramatically.

New Jersey: In August 2023, New Jersey'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 the card processing fees the merchant incurs in processing the transaction. Additionally, the law sets forth various surcharge disclosure requirements. This law became effective on August 18, 2022. For interchange plus merchants, the cost of each card can vary dramatically.

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

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surcharging laws are crafted in a manner that may not prohibit surcharging of commercial transactions. To ensure full compliance with all anti-surge laws, InterPayments currently does not differentiate between consumer and commercial transactions when determining the potential applicability of a state's anti-surge law.

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-surge 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 surge would need to be evaluated based on its particular facts and have emphasized a lack of disclosure for the surge or a merchant profiting from the surge as non-exclusive scenarios where the anti-surge statute may still prohibit a surge.

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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. 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:

1a) Notification Requirements until April 15, 2023

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

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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.

1b) Notification Requirements on and after April 15, 2023

Visa: Visa surcharge rule changes with regards to Visa notifications take effect April 15, 2023. Visa will no longer require merchants to notify them 30-days in advance. Instead, Visa requests merchants send the surcharge dollar amount to their payment gateway or acquirer. Visa desires the acquirer send the surcharge amount to Visa in its "Field 28 – Amount, Transaction fee" message format. However, until a merchant's payment gateway or acquirer can accommodate the Field 28 requirement, a merchant may still surcharge under its First Amendment Constitutional right.

Mastercard: A merchant that intends to surcharge must provide advance written notice to Mastercard (as applicable).

Acquirer: Both Visa and Mastercard require merchants to notify 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.

There are no changes to the per-transaction cardholder notification requirements. 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%) until April 15, 2023 and at three percent (3%) on and after April 15, 2023.

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.

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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.

d. 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.

e. 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 I: 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.