

New Jersey Joins Other States in Limiting Credit Card Surcharges

Insight

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The State of New Jersey has passed a new law limiting the amount of a credit card surcharge by a seller on a purchase of goods or services. New Jersey joins 12 other states and territories that have had laws on their books for decades to limit or prohibit such surcharges by sellers generally. Notably, additional states limit similar fees when charged on payments related to certain types of subject-matter transactions.

For years the card networks prohibited such generally applicable surcharges under their operating rules applicable to merchants, but the relevance of such laws returned in the past decade when the settlement of a lawsuit involving certain card networks resulted in the card networks permitting merchants to add surcharges to purchases of goods or services using cards. The card network rules now permit surcharges and certain other fees for use of a particular payment method or channel, but such fees are limited in various ways.

Despite no longer being subject to card network prohibitions on surcharges, merchants in states limiting or prohibiting such surcharges continued to face this statutory obstacle. Merchants in a number of those states apparently surcharged anyway, and were sued. This resulted in a number of federal cases holding such surcharge state statutes to be an unconstitutional restriction on commercial speech as applied to a "single-sticker" pricing model, rendering the statutes unenforceable under the circumstances of those cases.

In the aftermath of those cases, a number of states began proposing legislation to repeal their surcharge statutes, or to change the rule from a prohibition of surcharge to a limitation on the amount.

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This is a new type of response, in that the New Jersey Legislature has created a limitation on the amount of credit card surcharges where previously there was no regulation of such surcharges.

We believe this legislation may be motivated by the federal consumer financial regulatory climate, which has come out strongly during the Biden Administration against fees charged in the consumer financial market, including so-called “pay-to-pay” and convenience fees.

When making the decision whether to begin surcharging any payment method, it is important to consider several factors, including federal regulation, state law, and card network rules.

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