

New York Amends Existing Credit Card Surcharge Prohibition

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On December 13, 2023, the State of New York enacted [Assembly Bill No. 2672](#) (Act), which modifies New York's ban on credit card surcharges. The revised law takes effect on February 11, 2024.

Specifically, the Act purports to permit a seller in a sales transaction to impose a surcharge on customers that elect to use a credit card in lieu of payment by cash, check, or similar means (such as a debit card), so long as:

- The seller clearly and conspicuously posts the total price for using a credit card in such transaction, inclusive of the surcharge.
- The final price of the transaction, including any surcharge, is not greater than the posted price for the transaction.
- The surcharge does not exceed the amount charged to the business by the credit card network for the transaction.

The Act also clarifies that it does not prohibit merchants from offering a two-tier pricing system, in which a merchant displays two different prices depending on whether the customer uses a credit card or another payment method to complete the transaction.

Several other states, in addition to New York, have had laws on their books for decades banning merchants from imposing surcharges on credit card transactions while permitting discounts from the regular price for not using a credit card. Such laws have been the subject of a number of suits alleging that the restrictions constitute an unconstitutional restriction on commercial speech as applied to a "single-sticker" pricing model, where merchants post one price and charge more to customers who pay by credit card, because the

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restrictions arbitrarily favor communication of prices as “discounts” rather than surcharges. In many cases, state credit card surcharge laws have been rendered unenforceable due to that constitutional issue.

Legislatures have responded across the country by considering various ways to limit credit card surcharges. For example, Colorado, which previously banned credit card surcharges, changed its law to instead limit the amount. New York’s response is quite different, as it has basically doubled down on its surcharge ban.

In 2017, the U.S. Supreme Court raised the constitutionality issue and remanded the case to the Second Circuit for further proceedings on the question of whether the statute impermissibly regulated commercial speech. *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144 (2017). On remand, the lower court ruled that the statutory ban may be constitutional if compliance was possible by posting two prices (the discounted cash price and the credit card price).

The Act effectively codifies the lower court’s determination on remand, by requiring the posting of either the credit card price (thereby permitting a cash discount) or both the discounted cash price and the credit card price. By permitting the posting of the credit card price alone, but not the cash price alone, the ban on surcharges in New York effectively remains intact. The revised statute does not, however, resolve the question of whether New York continues to impermissibly regulate how merchants may communicate their prices.

When making the decision of whether to begin charging a processing fee on any payment method, including credit card surcharges, it is important to consider these state law limitations and related constitutionality issues, in addition to the card network rules.

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