

## Credit Card Surcharging Regulatory Changes Create Both Risks and Opportunities for Businesses

Credit card surcharging has increasingly gained the attention of consumers, businesses, and regulators over the past few years, and for good reason. As inflation continues to squeeze businesses and consumers alike, many companies have taken a hard look at the impact of credit card processing fees on their bottom line. In considering how to recoup those significant costs, the clear choice becomes either raising prices for all customers, or passing on those costs specifically to customers who choose to pay with credit, via credit card surcharging. For consumers, credit card surcharges can often be a source of frustration or confusion, particularly if they are not adequately disclosed.

Thus, state lawmakers have found themselves facing requests from the business community—particularly the restaurant industry and small business organizations—to permit credit card surcharging to allow for fair recoupment of those costs, while also contending with constituents who feel they are being nickel and dimed by fees at every turn. It is therefore unsurprising that a number of states have recently enacted surcharging legislation to provide guidance to businesses seeking to impose surcharges, and establish clear disclosure requirements and other consumer protection measures.

### **New York Surcharging Law Effective February 11, 2024**

New York enacted a new surcharging law in December 2023, which took effect on February 11, 2024.<sup>1</sup> The law repeals New York’s statutory ban on credit card surcharging and establishes disclosure requirements, limits on the amount of the surcharge, and penalties for violations of the law.

Specifically, it requires that businesses clearly and conspicuously post “the total price for using a credit card in [a] transaction, inclusive of surcharge,” while also allowing the “two-tier pricing system” which was previously permitted in the state following litigation over the state’s former statute banning surcharging.<sup>2</sup> Under the new law, the amount of the surcharge is limited to the amount “charged to the business by the credit card company.”

These changes provide important protections for consumers, and much-needed clarity to merchants—many of whom may have been unaware of the precedent permitting two-tier surcharging and consequently forgoing surcharging altogether.

Additionally, the new law establishes a civil penalty of up to \$500 per violation, which is enforceable by municipalities and local governments. While the law does not specifically provide for enforcement by the state’s attorney general, the New York AG’s office has historically been an aggressive consumer protection enforcer and would likely view non-compliance with the surcharging law as a violation of the state’s consumer protection laws, which is well within its enforcement authority.

### **New Jersey AG Announces Surcharging Enforcement Sweep, Publishes Guidance**

New Jersey enacted a new surcharging law in August 2023, which limits surcharging to “the actual cost to the seller to process the credit card payment,” and requires merchants to disclose the surcharge early in the transaction.<sup>3</sup> For in-person transactions, the disclosure must be made at the point of entry and point of sale. For online, mobile, or other electronic transactions, the disclosure must be made on the checkout page. The law also contains specific disclosure requirements for restaurants and for transactions completed by phone.



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New Jersey AG Platkin has wasted no time in investigating violations of the New Jersey surcharging law, which are now enforceable under the state’s Consumer Fraud Act. In December 2023, AG Platkin announced a “crackdown on hidden credit card surcharges,” stating that his office had investigated “dozens of complaints from New Jersey consumers, resulting in civil penalties against 30 businesses throughout the state[.]”<sup>4</sup> According to the AG’s office, the amount of civil penalties assessed against each business varied, “depending on the nature and number of violations found.”

Also in December 2023, the New Jersey AG’s office published guidance for merchants and consumers regarding credit card surcharging.<sup>5</sup> Among other things, the guidance advises that “[d]isclosing only that a surcharge will be applied, without also disclosing the amount prior to the consumer incurring a charge, is not sufficient to comply with the law.” Note, however, that disclosing the percentage (rather than dollars-and-cents surcharge amount) is permitted. The guidance also explains that businesses may impose a flat rate surcharge so long as the rate does not exceed the actual processing costs.

#### **More States Considering Surcharging Legislation in 2024**

As credit card surcharging becomes more prevalent across the country, more state legislators are examining the issue and introducing legislation to regulate the practice, often at the request of restaurant and small business industry associations. As of February 2024, at least ten states currently have bills pending that relate to credit card surcharging. While some are industry-specific or otherwise limited, many are of general applicability and follow the trend of the recently-enacted laws in Colorado, New Jersey, and New York in being fairly prescriptive with regard to disclosure requirements and permissible surcharge amounts.

Of note, legislation has been introduced in Massachusetts which, as drafted, would permit surcharging with certain guardrails.<sup>6</sup> This is significant because Massachusetts is one of only two states—in addition to Connecticut—that currently prohibits surcharging.

Businesses that already utilize credit card surcharging would do well to pay close attention to emerging legislation in any state where they accept consumer payments. And, businesses that have not yet considered credit card surcharging may want to consider seizing the opportunity to recoup processing costs, as surcharging becomes more prevalent and consumers become more accustomed to paying them. In any event, company surcharging policies and practices must include strict regulatory compliance.

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<sup>1</sup> See S. 1048A (N.Y. 2023) (amending N.Y. Gen. Bus. L. § 518).

<sup>2</sup> Under *Expressions Hair Design v. Schneiderman*, 975 F. Supp. 2d (S.D.N.Y. 2013); *rev’d*, 808 F.3d 118 (2d Cir. 2017), *vacated and remanded*, 137 S.Ct. 1144 (2017), the “two-tier pricing system” permitted surcharging so long as the surcharge amount is displayed or otherwise disclosed in dollars and cents.

<sup>3</sup> See N.J.S.A. § 56:8-156.2.

<sup>4</sup> See Press Release, AG Platkin, Division of Consumer Affairs Announce Educational, Enforcement Action Providing Financial Protections for New Jersey Consumers as They Shop, Dine, and Travel this Holiday Season (Dec. 19, 2023).

<sup>5</sup> See N.J. Off. of Att’y Gen., Div. of Consumer Affairs, *Credit Card Surcharges Frequently Asked Questions* (Dec. 11, 2023).

<sup>6</sup> See S. 2565 (Ma. 2024).