

## New York Amends Credit Card Surcharge Statute

February 29, 2024 | [Jay Harris](#), [Thomas P. Quinn, Jr.](#) and [Ryan S. Stinneford](#)

As the Kansas City Chiefs were winning the big game, New York made a big change to its law governing credit card surcharges.

While definitions of the term may vary, a "surcharge" is generally understood to mean a higher price that applies when a consumer uses a credit card instead of paying in cash. The business justification for this pricing differential is simple: merchants must pay transaction fees to credit card issuers for the right to accept credit cards as a form of payment. If merchants can pass this fee on to consumers, they can avoid raising prices for everyone. Alternatively, they can forego recoupment of the fee and accept it as the cost of doing business.

Initially, surcharges were banned by the federal Truth-in-Lending Act. However, this ban lapsed in the mid-1980s. When it did, New York and several other states filled the void by adopting their own state-specific bans. The New York statute was adopted in 1984. It stated that sellers in a sales transaction could not impose a surcharge on credit card holders who elected to use a credit card in lieu of paying by cash, check or other means. This statute remained unchanged for nearly forty years.

Toward the tail end of this four-decade run, the New York surcharge ban was challenged on a somewhat surprising front: the First Amendment. The gist of this claim was the statute prevented merchants from using "single sticker pricing" in which the cash price is disclosed, with a notation that credit card payments will be more, thus regulating the commercial speech of the merchant. The Supreme Court agreed with this argument. On remand, this litigation ultimately found its way in the New York Court of Appeals. The state's highest court held that to comply a merchant must post the total cost (in a "sum certain" dollar and cents amount) charged to credit card users. This litigation dead-ended in 2018.

Fast forward to last December. On December 13, 2023 Governor Hochul signed Assembly Bill 2672B into law. Codified as Chapter 723 of the Acts of 2023, this bill amended the New York surcharge ban effective February 11, 2024. The amendments changed the surcharge ban in two fundamental ways.

First, what was once a surcharge ban has transformed into a disclosure obligation aligned with the 2018 Court of Appeals ruling. Merchants imposing a surcharge are now required to post the total price of the transaction inclusive of the surcharge amount. Any

surcharge added is limited to a pass-through of the amount the credit card company charges to the merchant. Mark-ups, either by the merchant at the point of sale or by an intermediary between the business and credit card company, may not be passed on to the credit card user. Finally, the statute permits merchants to offer one price for cash purchases and another for credit card purchases so long as these amounts are posted alongside one another.

Second, the penalty provision of the statute - which previously rendered violations a misdemeanor, punishable by a fine up to \$ 500 and/or imprisonment up to a year - has been fundamentally altered. Violations of the statute are now of a civil nature, with a civil penalty of up to \$ 500 per violation after a court proceeding. Enforcement of the statute is decentralized to the municipal level, with any fines derived from successful enforcement flowing directly to municipal coffers.

The Secretary of State's Division of Consumer Protection has issued helpful [Credit Card Surcharge Guidance](#) for businesses that provide side-by-side examples of what is permissible and what is prohibited. For example, the Division now characterizes as "illegal" the charging of a convenience fee or service fee to credit card users as a separate line item on a receipt or invoice. It has also produced a document detailing [Credit Card Surcharge Violations](#), with examples of practices that businesses should avoid. There is even a brief cartoon video explaining what is permitted and prohibited under the revised law. In short, New York businesses are on notice.

There is one additional piece of guidance, the [Division of Consumer Protection's Legal Update Letter](#), and in light of the revised penalty provisions it is an interesting read. While this document includes the revised law and a brief "Practical Guidance" page with a bulleted list of do's and don'ts, this letter is not addressed to businesses as a compliance aid. Rather, it is addressed to local government leaders. The document notes that, because the Division of Consumer Protection often receives consumer complaints, it is requesting contact information for municipal officers tasked with enforcement responsibilities, stating that the Division "welcomes the opportunity to be a partner in protecting New York State consumers."

Deputizing municipalities as an enforcement arm of a state statute is noteworthy. Particularly when the statute provides an economic incentive for municipalities to be a willing conscript, as the penalty amounts for successful enforcement will go right to the municipalities' bottom line. To what degree this will result in a spike in enforcement remains unclear. However, New York businesses should consider this a possibility and make efforts to ensure compliance with the new requirements.

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