

# Card Organization Rules

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JANUARY 18, 2019 | HOLLI TARGAN

## The Surcharge Muddle: NY Ban Law Survives Lawsuit

The legality of surcharging keeps getting more confusing. Recent reports seem to indicate that New York's law prohibiting surcharging was overturned. Unfortunately, that overstatement confuses the actual status of the statute.

As you may recall, the card brand rules allow merchants to add a fee on top of the regular price for goods and services, also known as a surcharge, if a consumer pays by credit card. The rules require merchants to follow certain conditions and requirements if they surcharge credit card transactions.

But ten states have laws on the books that prohibit surcharges. Those laws have been contested in court. Merchants argue that the statutes violate the constitutional First Amendment right to free speech.

In 2013, a court agreed with the merchants and declared the New York surcharge ban law unconstitutional. The court interpreted the statute to prohibit merchants from calling the price difference a surcharge while allowing merchants to call it a discount. Similarly, in 2015 a California court approved an injunction preventing enforcement of California's surcharge ban. Other courts have upheld state laws prohibiting surcharges.

This threw the validity of those state surcharge ban laws into disarray.

Ultimately the New York case ended up in the U.S. Supreme Court, which ruled that the New York statute may be unconstitutional as a violation of the First Amendment right to free speech.

The case was remanded back to the Court of Appeals, which then asked a lower court to determine a very specific question: Does a merchant comply with the New York law if it posts the total dollars and cents price to credit card users? The lower court ruled in 2018 that yes, a merchant complies with the New York statute so long as the merchant posts the total dollars and cents price charged to credit card users.

Most critically, the court also opined that merchants may describe the difference in price any way they like. Therefore there is no basis for the merchants' argument that the statute violates the First Amendment right to free speech.

The merchants saw the writing on the wall. On January 8, 2019, the merchants and the New York Attorney General asked the court to vacate the lower court decision that found the law unconstitutional and to dismiss the case. The merchants are backing away from challenging the New York statute that prohibits surcharges. This means that the New York law prohibiting surcharging stands.

Here are the takeaways: 1) the recent action clarifies that New York merchants can charge two different prices, one for credit cards and one for cash; 2) the higher price charged to credit card users must be posted in total dollars and cents form, and 3) merchants can call the price differential anything they wish.

As of this writing, the case is not quite over, because the court still has to approve the request to vacate the lower court decision (which found New York's law unconstitutional).

It remains to be seen how this will affect other state's laws that prohibit surcharging. There are no clear answers quite yet. Keep an eye out for further developments.

In the meanwhile, know that most jurisdictions permit surcharging, ten states have statutes on the books that ban it, and the New York law prohibiting surcharging is still enforceable.

