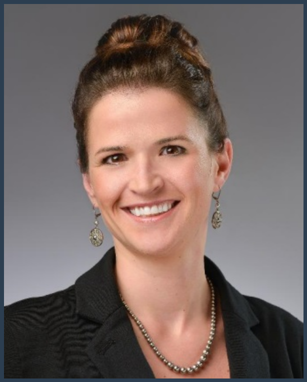
Understanding Convenience Fees

About Laurie

- Laurie is responsible for leading the internal processes for promoting and ensuring PaymentVision’s compliance with laws, regulations, company policies and agreements, compliance risk management, mitigation, and recovery efforts, and internal reporting programs. Laurie joined PaymentVision in 2014 as General Counsel and Chief Compliance Officer. Laurie holds a Juris Doctorate from Florida Coastal School of Law and Bachelor of Business Administration in Finance and Corporate Investments from East Tennessee State University.



About Simon

- Simon Y. Sandoval-Moshenberg is the director of the Immigrant Advocacy Program at the Legal Aid Justice Center in Virginia, where he specializes in consumer, housing, employment, and civil rights litigation in federal and state court. Sandoval-Moshenberg is also the Legal Aid Justice Center's team leader for consumer law, and was awarded the 2013 LASSY award from the Virginia Poverty Law Center for greatest achievement in consumer law. He has sued debt collectors and debt buyers on behalf of low-income immigrant consumers in dozens of individual and class actions. Sandoval-Moshenberg was named a SuperLawyers Rising Star in consumer law in 2015 and 2016. He is a graduate of Columbia University and Yale Law School, where he was awarded the C. LaRue Munson prize for excellence in clinical practice.

Disclaimer

(Yes, I have to…)

- This presentation is for informational purposes only and not for the purpose of providing legal advice. You should contact your attorney to obtain advice with respect to any particular issue or problem.

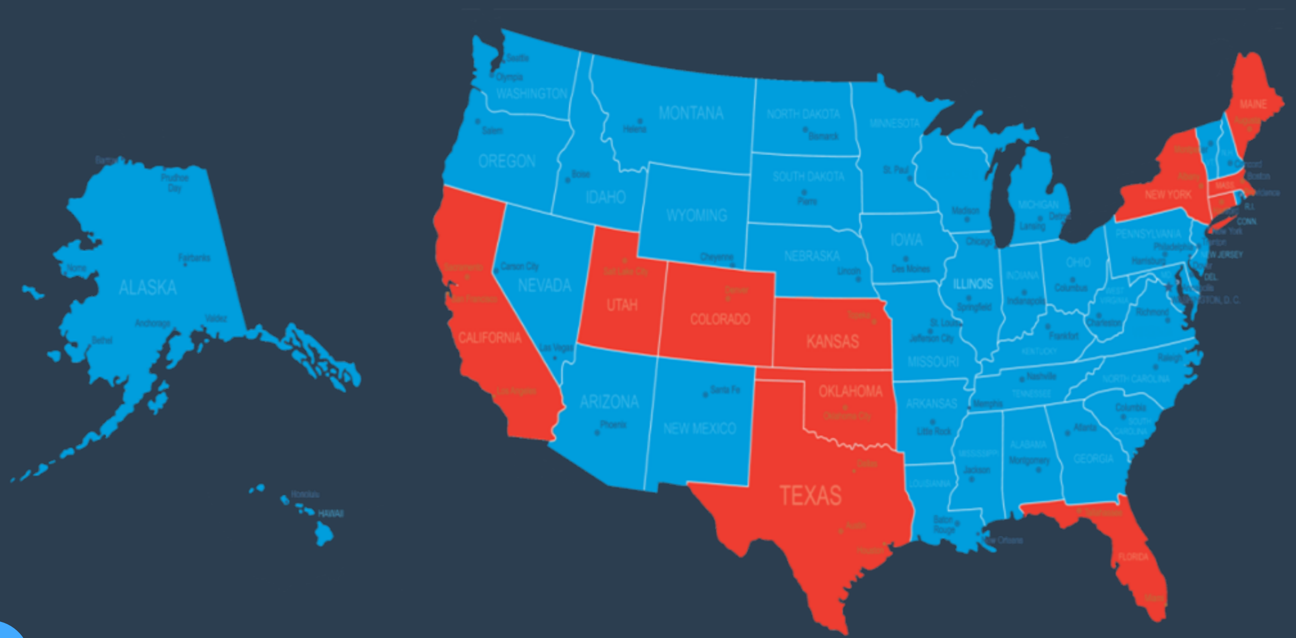
Convenience Fee vs. Surcharge

- Convenience Fee:
  - A convenience fee is a fee charged for a convenience in the form of an alternative payment channel (internet or phone) outside of the merchant's customary payment channel (in person or mail). There must be one payment channel that does not include a convenience fee.
- Surcharge:
  - A surcharge is an added charge for the privilege of using a credit card, instead of a debit card or cash. These charges get added to in-person transactions as well as payments made through alternative channels.

Convenience Fee vs. Surcharge

- Surcharge:
  - At this time 11 states have regulations that prohibit such fees, with many other states presenting similar policies.

States That Prohibit Surcharges



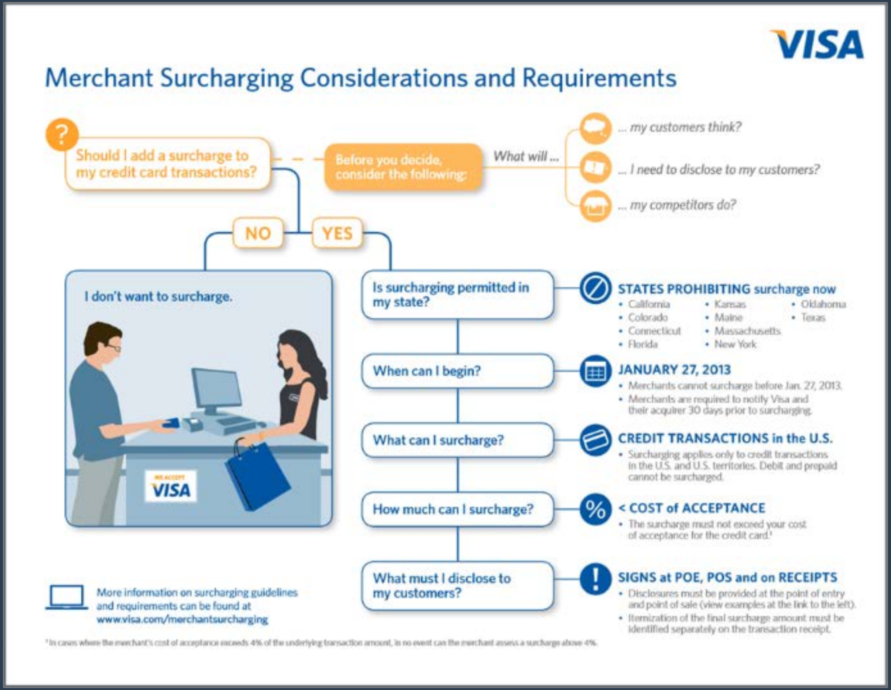
NOTE

If state law allows credit card surcharges, then the merchant must jump through a few hoops in order to comply with Visa and MasterCard rules.

Visa and Mastercard's Position on Surcharges

Interchange Fee & Antitrust Litigation

- In November 2012, the United States District Court for the Eastern District of New York preliminarily approved a proposed settlement agreement which, as part of this settlement, Visa and MasterCard were required to provide the ability for merchants in the U.S. and U.S. territories to surcharge certain credit card transactions beginning January 27, 2013.
- Merchants who choose to surcharge once the rule changes took place are required to follow certain requirements.
- What merchants can do:
  – Charge you extra for paying with any MasterCard or Visa card, up to 4 percent initially.
  – Offer discounts for paying with cash, check or debit (PIN).
  – Impose a surcharge for paying with a particular type of MasterCard or Visa.
  – Require a $10 minimum for credit card purchase.
- What merchants must do:
  – Disclose any credit card surcharges in signs at the entrance and near the register.
  – Detail the extra fee on your receipt.


VISA
Merchant Surcharging Considerations and Requirements
Should I add a surcharge to my credit card transactions?
Before you decide, consider the following:
What will ...
... my customers think?
... I need to disclose to my customers?
... my competitors do?
NO
YES
I don't want to surcharge.
WE ACCEPT VISA
Is surcharging permitted in my state?
STATES PROHIBITING surcharge now
• California • Colorado • Connecticut • Florida • Kansas • Maine • Massachusetts • New York • Oklahoma • Texas
When can I begin?
JANUARY 27, 2013
• Merchants cannot surcharge before Jan. 27, 2013.
• Merchants are required to notify Visa and their acquirer 30 days prior to surcharging.
What can I surcharge?
CREDIT TRANSACTIONS in the U.S.
• Surcharging applies only to credit transactions in the U.S. and U.S. territories. Debit and prepaid cannot be surcharged.
How much can I surcharge?
< COST of ACCEPTANCE
• The surcharge must not exceed your cost of acceptance for the credit card.[1]
What must I disclose to my customers?
SIGNS at POE, POS and on RECEIPTS
• Disclosures must be provided at the point of entry and point of sale (view examples at the link to the left).
• Itemization of the final surcharge amount must be identified separately on the transaction receipt.
More information on surcharging guidelines and requirements can be found at www.visa.com/merchantsurcharging
[1] In cases where the merchant's cost of acceptance exceeds 4% of the underlying transaction amount, in no event can the merchant assess a surcharge above 4%.

Now: Convenience Fees

- What is a convenience fee and why would you charge it?
  - Convenience fees are additional charges for the convenience of using an alternative payment method that isn’t the norm for the clients
  - They are typically used to recoup the cost of processing in an e-commerce or phone payment channel, but sometimes for face-to-face transactions.

Card Company Rules

- Network rules are confusing and not consistent across the card brands
- Rules also vary by industry within a network
- Consistent rules:
  - The convenience fee must be disclosed prior to the completion of the transaction, and the customer must be given the option to cancel the transaction if they do not want to pay the fee
  - Cannot characterize fee as an assessment to cover interchange. Merchant must provide a true "convenience".

VISA

- Convenience fees cannot be assessed for standard types of payment, such as and always including, face-to-face transactions.
  - Convenience fees cannot be assessed if an alternative payment channel is the only payment channel, such as for e-commerce retailers that only accept online payments.
- Convenience fees cannot be a percentage of the sale, but rather a fixed amount.
  - …except that an ad valorem amount is allowed where the merchant's pricing is subject to regulatory controls that make a flat fee infeasible.
- Convenience fees cannot be charged as in a separate transaction, but instead should be included with the principal payment in one transaction total.
  - Only charged by the merchant who actually provides goods or services to the cardholder. A Convenience Fee may not be charged by any third-party.
- Convenience fees cannot be charged on preauthorized recurring transactions.
- Convenience fees cannot vary for different types of payments on the same convenience channel.

- The fee cannot discriminate against or discourage the use of MC cards in favor of a competitive brand.
  - Does not prohibit waiving on Cash/ACH/Check payments.
- The payment of goods/services and convenience fee may be combined into a single transaction or submitted as two separate transactions.
  - Except for merchants participating in the MasterCard Utility Interchange where the convenience fee must be billed as two separate transactions

DISCOVER

- Allowed on card-not-present and face-to-face
- The fee cannot discriminate against or discourage the use of Discover cards in favor of a competitive brand.
  - Does not prohibit waiving on Cash/ACH/Check payments.
- Single and two transaction methods supported
- Cannot be assessed on a cash advance
- For Discover retained merchants:
  - Fee cannot exceed the merchant’s discount rate

AMERICAN EXPRESS

- Fixed or variable fee
- Allowed on card-not-present and face-to-face
- The fee cannot discriminate against or discourage the use of AMEX cards in favor of a competitive brand.
  - Does not prohibit waiving on Cash/ACH/Check payments.

Non-Compliance with Card Rules

- Merchants must know that if a convenience fee or surcharge rule is broken—they may be reported by a card holder for their practices and lose the ability to accept credit cards in the future (for continued non-compliance).
- Rules related to surcharge and convenience fee assessments are outlined in the Visa/MC public websites
  - https://usa.visa.com/checkoutfees/contact.jsp
  - http:www.mastercard.us/support/merchant-violations.html

Federal and State Positions

- This discussion varies on industry for today's purpose, lets look at the collection space.
  - FDCPA
    - Under federal debt collection laws known as the Fair Debt Collection Practices Act ("FDCPA"), a debt collection agency cannot collect or try to collect a fee unless the fee is expressly authorized by the agreement creating the debt or permitted by state law. In other words, the FDCPA allows the collection of an additional amount if state law expressly permits it, even if the contract is silent on the matter; however, if state law neither affirmatively permits nor expressly prohibits collection of an additional amount, the amount can only be collected if the consumer expressly agrees to it in the contract.

So, is a convenience fee a collection fee?

- Important questions have been used by regulators and courts when reviewing if a fee is a collection fee under the FDCPA. As a general rule, the addition of any fee and/or expenses incidental to the original debt is a collection fee. Therefore, the company must be prepared to answer the question, is it incidental to the debt? The two most important points to address this question as it pertains to the company’s process to determine if the fee was not incidental are (1) can the fee be reasonably and easily avoided, and (2) is it a source of revenue for the company.

Can the fee be reasonably and easily avoided?

- Is the free method in fact the intended primary method in which a client is intended to pay?
  - If a company claims the primary method is face to face only but service clients nationally with one location, it would be hard to argue that the method was truly a primary method.
- Was the client provided disclosure of free primary methods boldly, conspicuously, and prior to authorizing the convenience fee? Is the understanding of the free method clear?
  - Including Mailings, Webpages, Phone scripts, etc.

Can the fee be reasonably and easily avoided?

- If proper disclosure was provided and the method charging the fee is one that a reasonable view would see as an added convenience, a company could argue that the convenience fee was not incidental. The company could present a case of a fee that was added as an added convenience to provide a payment method that's not considered in the pricing of the original agreement and, therefore, not a collection fee of the original agreement. That brings us to the next consideration…

Is it a source of revenue for the company?

- Does the company have the opportunity to net income from the fee or is it paid out directly to a third party that provides the convenience fee option channel.
  - If a company makes income on the convenience fee, it is easy for someone to dispute the idea that the fee is in fact solely to provide a convenience method of payment. A client could present a case where they claim that the fee was added for the company to create more revenue from the original agreement.

Is it a source of revenue for the company?

- To avoid a question of the beneficiary of the funds, the company should ensure that disclosure is made to the end client as to whom will ultimately receive the fee. That said, the easiest way to do this would be to charge two separate transactions, which would result in two separate transactions billed to the client under the separate entity's' name. The principal charge in the company's name and the convenience fee in the name of the third party.

Is it a source of revenue for the company?

- Unfortunately, previously mentioned, Visa rules require that convenience fees be charged in one transaction, and prohibits a second transaction for the fee.
  - The transfer to the third party would happen during the settlement. For example, a client pays $100.00 and a convenience fee of $5.00 is added to an online payment portal provided for after hour payments. The charge would be completed in one transaction and the client's statement will show a charge of $105.00. Out of this total payment, $100.00 would be settled to the company and the $5.00 would be settled to the third party who would be responsible for the processing costs. An agreement documenting the terms between the company and the third-party and proper disclosure should be clear.

So what does this mean?

- Surcharges- follow card rules, review state regulations
- Convenience Fee- determine your risk level
  - Ensure Disclosure to the end client.
    - It is very important to make it clear to the end client the charge that the channel will be subject to. The end client should understand that the convenience fee will ultimately be paid out to a specific third party and itemized on the statement. The client should also clearly understand that the convenience fee option is NOT required. The free options (including at minimum face to face) should be clearly laid out to the end client.
  - Free Options
    - Client should provide free options which at minimum, must include the face to face/ mail in option. If Credit Cards are offered in a convenience fee model, this method should also be offered in a free model.
    - Urgency channels only. This provides the argument that this fee is small in comparison to the potential late charge that the client could be subject to.
  - Flat and Reasonable Fee
  - No revenue to Debt Collector
  - Know your third party processor
  - Training, Training, Training and Periodic Compliance/Legal reviews

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