
Coates' Canons Blog: Local Governments Now Allowed to Charge Fees for Accepting Credit and Charge Card Payments

By Kara Millonzi

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In a previous **post**, I detailed how the major credit card companies (Visa and MasterCard) effectively prohibited a local government or public authority from assessing a surcharge on customers who remitted payment of fees, assessments, and sometimes even taxes, by credit card, charge card, or debit card. According to contractual agreements with the credit card issuers, merchants were allowed to charge a “convenience fee” to customers who paid by credit or charge card on the Internet or through an automated phone system. Such fees were prohibited in face-to-face transactions, though. (Although Visa also allowed a government to assess a “service fee” on certain face-to-face tax payments, with some restrictions.)

That all changed on January 27, 2013. A court-sanctioned settlement between retailers, several major banks, and Visa and MasterCard, arising out of a class action anti-trust lawsuit—*In re Payment Card Interchange Fee & Merchant Discount Antitrust Litigation* (1:05-md-01720-JF-JO)—now authorizes merchants (including government entities) who accept credit and charge card payments to impose a “checkout fee” on all credit and charge card transactions.

The Lawsuit

The lawsuit, filed on behalf of merchants in 2005, alleged, among other things, that the credit card issuers unlawfully fixed interchange fees. An interchange fee (also known as a swipe fee or discount rate) is the fee paid by merchants to the credit card-issuing bank for the privilege of accepting credit or charge card payments. The fees are set by the credit card networks and vary based on type of card, regions or jurisdictions, card brand, type and size of merchant, and type of transaction. The fees typically include a flat fee plus percentage of the total purchase price involved in the transaction and average about 2-3 percent. The price-fixing claim arose out of the practice of Visa and MasterCard to set fee schedules centrally, which were then followed by other card issuers.

The parties reached a settlement in July 2012, which was preliminarily approved by Judge John Gleeson in *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, WL 5989763 (E.D.N.Y. Oct. 24, 2012).

Settlement Provisions

According to the terms of the settlement agreement, effective January 27, 2013, Visa and MasterCard allow merchants to impose surcharges, referred to as checkout fees, on credit and charge card transactions. (The definition of merchant includes government entities that accept credit or charge cards as payment for fees, assessments, or taxes.) A merchant may assess surcharges at either the brand level (such that the charge is the same for all Visa or MasterCard transactions, regardless of the card’s issuer or product type) or product level (such that the charge is the same for all transactions on a particular Visa or MasterCard product type, regardless of the issuer), but not both. And a merchant who chooses to surcharge must comply with certain notice, disclosure, and rate limitations.

Notice. A merchant must notify Visa or MasterCard, and the merchant’s acquirer (the bank or financial institution that processes the credit and charge card payments for the merchant) at least thirty days before imposing surcharges. The notice must specify whether surcharges will be assessed at the brand level or product level.

Disclosures to “Customers.” A merchant also must provide clear disclosure to its customers of the surcharge. There are a couple of different components to this requirement.

- (1) At the point of entry to the “store” (government unit) and on the first page on the merchant’s website that



references credit card brands, the merchant must disclose that it is imposing a surcharge that is not greater than its applicable merchant discount rate for Visa or MasterCard transactions;

(2) At the point of “sale” (where the fee, assessment or tax is paid), the merchant must disclose both the amount of the surcharge and the fact that it is being imposed by the merchant, and it must do so “in a manner that does not disparage the brand, network, issuing bank, or the payment card product being used;” and

(3) On the transaction receipt that is given to the “customer,” the merchant must separately state the dollar amount of the surcharge.

Rate Limitations. The surcharge imposed by a merchant generally may not exceed the merchant’s average cost of accepting the credit or charge card. And there is a hard cap of 4 percent of the transaction amount even if the merchant’s average cost exceeds this amount.

Surcharging Only Certain Card Brands

A merchant is allowed to apply the surcharge only on Visa and MasterCard transactions and not apply it to other card brands. However, a merchant must surcharge Visa or MasterCard customers on the same terms and conditions as any equal or higher cost competitor that imposes limits on surcharging. (This includes American Express.) Thus, if a merchant accepts other card brands, it must ensure that it is complying with the restrictions imposed on all the card brands.

No Surcharges for Debit Card or Prepaid Card Transactions

Furthermore, the authority to surcharge only applies to credit card purchases. Merchants cannot surcharge debit card or prepaid card purchases. This is true even if a debit cardholder chooses “credit” on a point of sale terminal.

Local Government and Public Authority Options

As stated in the previous **post**, state law clearly allows (but does not require) local governments, public hospitals, and public authorities to impose surcharges on any person who pays taxes, assessments, or fees with a credit card, charge card, debit card, or electronic funds transfer. **G.S. 159-32.1**. The major credit card companies now also allow this practice, subject to the restrictions and procedural requirements listed above.

Whether a unit imposes the surcharge is a policy decision that must be made by a unit’s governing board. If a local government or public authority chooses to impose the surcharges on credit and charge card transactions, it must do so uniformly across the unit. Each department that accepts credit and charge cards should impose the surcharge according to the same policy.

Links

- canons.sog.unc.edu/?p=1051&print=1
- canons.sog.unc.edu/?p=1051
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_159/GS_159-32.1.html