

## Oklahoma AG: Surcharges OK

*Recent opinion provides welcome clarity on Oklahoma's position on surcharge ban enforceability, relating to electronic payment processing*

By Nicole Meisner and Daniel Ungar, Attorneys, Jaffe, Raitt, Heuer & Weiss

Judicial developments surrounding the legality of credit card surcharging have made keeping up with the latest news on this issue a challenge. Currently, there are several states with laws in place prohibiting surcharges. Merchants have challenged the constitutionality of these laws in court, sometimes with some confusing results.

Because surcharge laws have generally been in a state of flux since a 2017 Supreme Court ruling called the constitutionality of these laws into question, merchants and payment processors alike have been hungry for additional clarification on both state and national levels. A recent Oklahoma opinion released by the state's Attorney General provides some welcome (albeit still conditional) clarity on this issue.

As the opinion explains, 'Federal courts have invalidated several state statutes that prohibit merchants from imposing surcharges on purchases made with credit cards' while simultaneously 'allowing merchants to offer discounts for making the same purchase with cash or check.' These courts found that the statutes regulating what label merchants can use for differentiated pricing constitute impermissible commercial speech regulations and violate the First Amendment.

It was in that context that the Attorney General evaluated Sections 2-211 and 2-417 of Oklahoma's Consumer Credit Code, which allow discounts on purchases made with cash or checks, while banning surcharges on purchases made with credit or debit cards. The AG found that the Oklahoma law, if interpreted in the same way as analogous laws in other states by federal appeals courts, would not survive constitutional scrutiny.

While this opinion clarifies the State's position on the enforceability of its surcharge ban, it is important to note that it does *not* completely invalidate the law. The reason is that the Oklahoma statute, like most of the statutes at issue in the other cases, does not define the terms 'surcharge' or 'discount.' Because the opinion left open the possibility of alternative statutory interpretations, it could not 'say definitively that no possible application of the statute is consistent with the First Amendment.' Accordingly, it did *not* find the statute to facially violate the constitution. However, as applied specifically to the facts at issue in similar cases in California and Texas, which relied on the 'plain

meaning of surcharge,' the law would indeed run afoul of the First Amendment and constitute an unconstitutional restriction of commercial speech.

The decision *does* provide processors and merchants with much-needed guidance about what kind of pricing scheme would be permissible. Specifically, that credit card surcharges can be applied through 'a single sticker pricing scheme with some sort of increase from credit card purchases.' As a result, payment processors and their merchant customers can more confidently pass the cost of processing through to consumers, as long as the merchant clearly discloses the higher credit card price to consumers in advance, preventing any bait-and-switch tactics. As federal courts have acknowledged, a law which purports to regulate unfair pricing tactics would be on firmer constitutional ground than one that just regulates price *labels*.

While the Oklahoma opinion adds a few more brush strokes to the larger legislative canvas, it is not conclusive for all possible pricing schemes. As the opinion concludes, 'Many pricing schemes are possible, and we have not considered- nor would it be feasible for us to consider-how all possible pricing schemes would fare under the First Amendment.' Moreover, it cannot be relied upon in other states. Thus the overall picture remains unclear. Processors, merchants, and other interested parties would be wise to recognize that surcharging laws are still very much in flux. They should be mindful of state laws and interpretations, as well as the very specific card brand requirements, before implementing a surcharge program, and should continue to closely monitor new legislative and judicial developments on this issue.

Nicole Meisner and Daniel Ungar are attorneys in the Electronic Payments Practice Group at Jaffe, Raitt, Heuer & Weiss, who concentrate their practice on legal issues surrounding card processing, fintech, money transmitter, mobile payments, ACH, and stored-value systems, both domestically and internationally. You may reach them at [nmeisner@jaffelaw.com](mailto:nmeisner@jaffelaw.com) and [dungar@jaffelaw.com](mailto:dungar@jaffelaw.com).

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## Practice Areas

- Electronic Payments Law

## Attorneys

- Nicole Meisner
- Daniel Ungar