

REVISITING THE ISSUE OF CREDIT CARD SURCHARGES

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Credit cards are both a bane and a blessing to all merchants, including funeral homes. From a cash flow perspective, funeral homes welcome the prompt payment provided by credit cards. In addition, consumers who are always looking for reward points, appreciate that a funeral home will accept credit cards.

However, credit cards also extract a fairly substantial price. Depending upon the credit card processing company the funeral home uses, the funeral home's cost of credit card acceptance may be from 2% to 4%. For a funeral costing \$10,000, that amounts to a financial hit of \$200 to \$400. As more and more consumers use credit cards, the overall impact imposed by credit card fees becomes substantial on the funeral home's bottom line.

The obvious response to losing 2 to 4 percentage points on every credit card sale is to impose a surcharge on purchasers who use credit cards. However, when credit card usage greatly expanded 40 years ago, Congress passed a law prohibiting merchants from imposing surcharges. Fortunately, in 1984, Congress allowed that law to expire and it has never been renewed.

Even though the federal law restricting surcharges expired, ten states (CA, CO, CT, FL, KS, ME, MA, NY, OK, and TX) have state laws prohibiting surcharges. So funeral homes in those ten states can probably stop reading this article because your law prohibits any type of surcharge. Nevertheless there are several court challenges to these state laws and a case challenging New York's law has even gone up to the U.S. Supreme Court. The Supreme Court sent the case back to the Court of Appeals to determine whether state laws banning credit card surcharges violate the First Amendment. NFDA will continue to monitor that lawsuit.

For funeral homes in the other 40 states, they gained the ability to impose credit card surcharges on January 27, 2013. That was the date that VISA and Mastercard stopped prohibiting surcharges on credit card users as a result of a settlement of an antitrust lawsuit. (VISA and Mastercard still prohibit surcharges on debit cards). Therefore, for the past 4 ½ years, funeral homes in 40 states have had the option of imposing surcharges. But, the vast majority of them have declined to do so. Why?

The first reason is probably a fear of antagonizing the consumer. No funeral home wants to be the first in its area to impose a credit card surcharge. This is not unique to funeral homes. In many markets, merchants have not instituted surcharges out of competitive concerns.

The second barrier to imposing credit card surcharges is the wide array of hoops that VISA and Mastercard require a merchant to jump through. Although VISA and Mastercard now allow merchants to impose surcharges, they have not made it easy to do so. Each has established extensive requirements that persuade many merchants, including funeral homes, to forgo credit card surcharges. Those surcharging requirements include the following:

1. Advanced Notification. At least 30 days prior to imposing a surcharge, a merchant must complete online forms and submit them to VISA and Mastercard. The form must also be submitted to the merchant's credit processing company. VISA's form can be found at www.visa.com/merchantsurcharging and Mastercard's form at mastercard.us/en-us/surcharge-disclosure-webform.html#contentpar_text.

If the funeral home accepts the Discover credit card, it may notify Discover by downloading the notice at www.discoversurcharge.com. There is no notification requirement for American Express.

The forms are not too difficult to fill out. However, they do require the merchant to describe the type of surcharge that will be imposed. The choices are Brand or Product. We discuss these two types of surcharges below.

2. Notifications to Consumer. Both Mastercard and VISA require a merchant to provide at least three written notifications to consumers that it is imposing a credit card surcharge. The first written notification must be posted at the point of entry to the merchant's place of business. For a funeral home, this would mean the main entrance to the funeral home. The disclosure must include a statement that the surcharge that the funeral home imposes is not greater than the merchant's discount rate for credit card transactions. An example of the disclosure that could include both the VISA and Mastercard requirements is found below:

**We impose a surcharge
on credit cards that is
not greater than our
cost of acceptance**

If the funeral home is selling over its website and imposes a surcharge, the notification must be made on the first page of the funeral home's website that references credit card brands.

In addition to the disclosure at the point of entry, the funeral home must also disclose the surcharge practices at the point of sale. This would typically require the disclosure to be posted in the arrangement office. This disclosure must include the percentages applied to the surcharge, a statement that the surcharge is being imposed by the merchant, and an indication that the surcharge is not greater than the merchant's cost of acceptance. A sample disclosure is found below:

We impose a surcharge of _____%
on the transaction amount on
VISA, Mastercard, and Discover
credit card products, which is not
greater than our cost of
acceptance. We do not surcharge
debit cards.

The final disclosure regarding the surcharge must be made on the purchase order or receipt that is given to the consumer at the sale. That disclosure must list the dollar amount of the surcharge. Therefore, in the case of a funeral home, it would have to include on the Statement of Funeral Goods and Services Selected a listing showing the dollar amount of the credit card surcharge. That listing would have to be in the same print size and font as the other items on the Statement.

3. Caps on Surcharge. While VISA and Mastercard allow surcharges, they prohibit a merchant from charging more than the merchant pays to have the credit card processed. This makes it difficult for the merchant to collect the maximum surcharge amount because fees vary widely, especially with the flood of reward cards available to the public.

As noted above, there are generally two types of surcharges – Brand and Product. With a Brand surcharge, the merchant applies the same surcharge for all credit cards under a certain brand. For example, even though VISA has awards cards that may cost more to process, a merchant who imposes a Brand surcharge will impose the same percentage surcharge on all VISA credit cards.

The other alternative is to impose Product surcharges. This requires the merchant to track the cost of processing each particular credit card. So, unlike a Brand surcharge where a funeral home would impose the same surcharge for all VISA

cards, with a Product surcharge, each type of VISA card would have its own maximum surcharge.

Obviously, the use of the Brand surcharge will be the easiest for a funeral home to use. It will allow the funeral home to impose a uniform surcharge for every credit card. Moreover, since VISA and Mastercard publish each year the maximum surcharge cap, it is easy to determine what surcharge will be imposed.

In setting the maximum surcharge cap for Brand levels, Mastercard and VISA provide for different surcharges depending upon the type of merchant. For example, currently a grocery can only impose a maximum surcharge of 1.65% while businesses in the travel sector can go up to 2.51%. Funeral homes would fall under “professional services” with a current maximum surcharge of 2.24%.

While American Express, Discover and other credit cards allow surcharges, they all prohibit a merchant from discriminating against their cards. Therefore, the maximum surcharge imposed by the merchant on VISA and Mastercard would also have to be the maximum amount imposed on other credit cards like American Express and Discover.

Therefore, if a funeral home in one of the 40 states where credit and surcharges are lawful decides to impose a surcharge, they need to notify VISA, Mastercard and their credit card processing company, post the required notices, and not exceed the maximum surcharge amount.

NFDA members with a question may contact Scott Gilligan at scott@gilliganlegal.com. In addition, if your funeral home charges a credit card surcharge, we would like to hear about your experience in doing so, including any pushback from consumers.