

Memorandum

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To: Anthony Bento, CNCDA

From: Aaron H. Jacoby
Lisa Singer

Re: Credit Card Surcharges

Aaron H. Jacoby

Managing Partner, Los Angeles
213.443.7568 **DIRECT**
aaron.jacoby@afslaw.com

Lisa Singer

LA Automotive Compliance Director
213.988.6691 **DIRECT**
lisa.singer@afslaw.com

The California New Car Dealers Association has requested an update to the memo we provided in June 2023 regarding whether California dealerships can legally impose credit card surcharges. Below is our executive summary followed by a detailed discussion.

I. EXECUTIVE SUMMARY

Dealerships can impose credit card surcharges for parts and service sales, provided the surcharge is clearly and conspicuously disclosed on the receipt, via signage displayed by the cash register, and through online disclosures for electronic transactions. Credit card surcharges are also permissible for vehicle sales where the customer does not enter into a conditional sale contract (where title vests in the buyer at the time of delivery and the seller does not have a security interest in the vehicle). In the case of finance and lease transactions, the law is unclear as to whether the surcharge is permitted in California, and if so, how it must be disclosed on the contract. Adding a surcharge in those situations adds a level of risk, including class action risk due to the multitude of transactions, though there is case law that arguably supports such charges.

II. DISCUSSION

California Law Banning Credit Surcharges

In 1985 California enacted Civil Code § [1748.1](#), which bans credit surcharges but allows discounts for cash payments. This section provides:

- (a) No retailer in any sales, service, or lease transaction with a consumer may impose a surcharge on a cardholder who elects to use a credit card in lieu of payment by cash, check,

or similar means. A retailer may, however, offer discounts for the purpose of inducing payment by cash, check, or other means not involving the use of a credit card, provided that the discount is offered to all prospective buyers.

In *Italian Colors v. Becerra* (9th Cir. 2018) [878 F.3d 1165](#), five plaintiffs sued the Attorney General of California challenging the constitutionality of California Civil Code § 1748.1. The plaintiffs argued that the law violates the First Amendment by unlawfully regulating commercial speech. Each of the five businesses sought to post a sticker price and add a fee for credit card usage. Under § 1748.1(a), they could not express the price and credit card surcharge in that manner. Instead, the law only allowed the retailers to offer discounts for paying in a manner not involving the use of a credit card. The district court granted the plaintiffs' motion for summary judgement, declaring that Section 1748.1 was an unconstitutional restriction of speech, and permanently enjoined Section 1748.1 from being enforced.

California's Attorney General (AG) appealed the case to the Ninth Circuit, which affirmed the district court's grant of summary judgement for the plaintiffs, but modified the relief, holding that the law was only invalid as applied to the five plaintiffs of the case. However, the AG's webpage titled "[Credit Card Surcharges](#)" expands the holding to cover similarly situated merchants:

"...The Attorney General will generally apply the Italian Colors decision to merchants that are similarly situated to the Italian Colors plaintiffs."

If a dealer allows a consumer to pay for parts, service, or even a new or used motor vehicle with a credit card, the dealer would be "similarly situated" to the *Italian Colors* plaintiffs. However, none of the five plaintiffs in the *Italian Colors* matter imposed a credit card surcharge in connection with a financed transaction or a lease transaction. It is unknown whether a dealership that does so would be deemed "similarly situated" to the *Italian Colors* plaintiffs. Since Civil Code § 1748.1 has not been repealed, the AG might seek to apply it to prohibit a dealer from imposing a credit card surcharge in such transactions. To minimize such risk and to maximize the defense against any such action, a dealer should follow the same disclosure procedures that were deemed lawful in *Italian Colors*.

Financed Vehicle Sale Transactions

In a vehicle sale scenario where the customer is financing their purchase, any credit card surcharge must be disclosed to the consumer. California's Automobile Sales Finance Act ("ASFA") [Civil Code §§ [2981 - 2984.6](#)] requires dealerships to provide specific, mandatory disclosures prior to entering into a motor vehicle retail installment sale contract ("RISC"), including disclosures required by the Federal Truth-in-Lending Act [15 U.S.C. § [1601](#) et seq.] ("TILA") and its implementing provisions, [Regulation Z](#). [Civil Code § [2982](#)] Among other disclosures, a RISC

must disclose the “finance charge” which “is the cost of consumer credit as a dollar amount. It includes any charge payable directly or indirectly by the consumer and imposed directly or indirectly by the creditor as an incident to or a condition of the extension of credit. It does not include any charge of a type payable in a comparable cash transaction.” [Civil Code § [2981\(j\)](#); 12 CFR § [226.4\(a\)](#)] Since a credit card surcharge would not be imposed in a true cash transaction (green money or wired payment) for the sale of a vehicle, it likely qualifies as a finance charge. The agreed-upon vehicle selling price cannot simply be increased to recoup a finance charge. [See *Thompson v. 10,000 RV Sales, Inc.*, [130 Cal.App.4th 950](#) (2005)] Instead, the charge must be itemized and included when calculating the amount of the finance charge displayed in the truth-in-lending box, typically appearing on the first page of a RISC. Adding this charge will also affect the calculation of the APR, and may require a DMS programming change.

Moreover, under Civil Code § [2981.9](#) (known as the single document rule), the buyer’s agreement to pay the surcharge must be included in the RISC, since it affects the total cost and terms of payment for the motor vehicle. If the surcharge qualifies as a prepaid finance charge, it must be disclosed as such in the itemization of amount financed. [Civil Code § [2982\(a\)\(7\)](#)] Although ASFA does not define a “prepaid finance charge,” Regulation Z defines the term as “any finance charge paid separately in cash or by check before or at consummation of a transaction, or withheld from the proceeds of the credit at any time.” [12 C.F.R. § [226.2\(a\)\(23\)](#)] If a prepaid finance charge is added to the itemization of amount financed, it must be subtracted from the total of all charges to arrive at the “amount financed,” which may require another DMS programming change. Otherwise, the “amount financed” will be overstated.

The standard RISC used by most California dealerships does not accommodate the disclosure of a credit card surcharge as a prepaid finance charge. Due to AFSA’s itemization and sequence requirements described in Civil Code § [2982](#), the prepaid finance charge must be disclosed within the itemization of the amount financed after the downpayment amount and before the amount financed. Standard RISC forms do not include a line for a prepaid finance charge in this location and would likely require other changes to the pre-printed language regarding how the finance charge is calculated. Before exploring making changes to the standard RISC, dealerships should check with their lenders to see whether the lender will take assignment of a RISC that includes a credit card surcharge, and if so, whether the lender has specific requirements regarding how the surcharge must be disclosed or any limitations that may apply.

Lease Transactions

The California Vehicle Leasing Act [Civil Code §§ [2985.7 – 2993](#)] also requires disclosure of a credit card surcharge. Under this Act, a lease contract must disclose all information required by Regulation M [12 CFR Part [213](#)], the federal consumer leasing law. [Civil Code § [2985.8\(c\)\(1\)](#)] Similar to RISCs, California leases are also subject to a single document requirement: “A lease

contract... shall contain in a single document all of the agreements of the lessor and lessee with respect to the obligations of each party.” [Civil Code § [2985.8\(a\)](#)] If a consumer uses a credit card to pay all or part of the driveoff fee, and the dealer imposes a credit card surcharge, the existence and amount of the surcharge must be disclosed in the lease. As with RISCs, dealerships desiring to impose a credit card surcharge in a lease transaction should first check with the leasing companies with which they do business to find out whether they will permit a credit card surcharge, and if so, whether the leasing company has specific requirements regarding how the surcharge must be disclosed or any applicable limitations. Then, before proceeding, dealerships should review the leasing companies’ requirements with knowledgeable counsel.

Disclosure of Credit Card Surcharge

The California AG’s [website](#) indicates that the amount of the surcharge must be disclosed via signage at the cash register display and on the receipt. The website states, “Merchants are still barred from misleading customers, such as by falsely advertising a lower price than they actually charge or hiding any differences between credit card, debit card, and cash prices. Be sure to check the cash register display and your receipt to make sure that the price you’re being charged matches the advertised or posted price of an item (plus tax, if applicable).” Below is suggested disclosure language regarding credit card surcharges:

A surcharge of ____% on the transaction amount will be charged for payment by credit card, which is not greater than our cost of acceptance. There is no surcharge for payments made by debit card, check or cash.

Or, if the dealership uses a third-party surcharging service (see discussion below) and the customer’s credit card statement will show a separate surcharge fee by the credit card surcharging vendor:

A surcharge of ____% on the transaction amount will be charged for payment by credit card. This fee is charged and retained by our credit card processing vendor, [*insert name*]. There is no surcharge for payments made by debit card, check or cash.

This second disclosure may minimize consumer claims that there is an unrecognized or unauthorized charge on their credit card statement.

Dealers should post signs regarding credit card surcharges at the following locations:

- Parts and service sales. Signs should be conspicuously posted at the entrance(s) to the service and parts departments and near the cashier. If possible, the surcharge disclosure

should also be added to the customer's repair order estimate, to avoid any surprise when the customer returns to pick up their vehicle.

- Vehicle sales. The sign should be conspicuously posted at the entrance to the showroom and in each finance office.
- Online transactions. If a customer will be paying electronically, the disclosure must be conspicuously displayed online prior to the completion of the transaction.

For all transactions in which a credit card surcharge is imposed, the receipt should show the cash price and the surcharge amount.

Merchant Agreements

Before imposing credit card surcharges, dealers will need to check each of their merchant agreements regarding (1) advance notification requirements before imposing surcharges, (2) limits applicable to credit card surcharges and (3) disclosure requirements for in-store transactions and online transactions. For example, see [Mastercard Rules](#) and [Visa Core Rules](#).

SB 478/Civil Code Section 1770 Does Not Prohibit Credit Card Surcharges

On July 1, 2024, SB 478, the "Hidden Fees" law became effective. This bill amended Civil Code Section [1770](#), by adding section (29)(A)¹. This new section prohibits advertising or listing a price for a good or service that does not include all mandatory fees or charges other than certain government fees and shipping costs. So long as a dealer accepts cash, checks and/or debit cards (without imposing a surcharge) and does not require payment by credit card, a dealership that imposes a credit card surcharge is not imposing any additional "mandatory" fee.

The California AG confirmed this interpretation by posting the following question and answer in its online [FAQs](#) regarding the new law:

- Q. Does a business need to include credit card processing fees in the advertised price?
- A. Generally, no, because a credit card processing fee is not a mandatory fee if the customer can avoid the fee by paying a different way (e.g. cash.) However, if a business only accepts credit cards as a form of payment, then the credit card fee is mandatory and would have to be included in the advertised price.

To make clear that the dealership's credit card surcharge policy does not violate the "Hidden Fees" law, the dealership's signage/disclosures regarding the surcharge should explicitly state that the

surcharge does not apply to payments made by debit card, check (if accepted by the dealership) or cash (see discussion above).

Third-Party Vendors

Numerous companies now offer credit card surcharging services. Dealers that use such services typically charge customers a flat surcharge fee, such as 3%, for all credit card charges regardless of which credit card the customer uses to make a payment. One hundred percent of the surcharge fee that is collected from the customer is paid to the vendor, so the dealer does not profit from the surcharge.

The *Italian Colors* case did not mention, or appear to involve, a third-party credit card surcharging service. Nevertheless, there is no language in the decision that would prohibit using such a service to facilitate surcharging. Thus, a dealer that contracts with a third-party for credit card surcharging would likely still be “similarly situated” to the plaintiffs in the *Italian Colors* case, meaning the imposition of credit card surcharges with the assistance of the third party should be permissible.

Tax Treatment of Credit Card Surcharges

According to the Sales and Use Tax Annotations published by the California Department of Tax and Fee Administration, a credit card surcharge “is part of the consideration for the sale of the tangible personal property, and is therefore part of gross receipts subject to sales tax.” [[Annotation 295.2000](#); see also [Does Your Business Add a Surcharge?](#), CDTFA L-903 (8-23)] Note, a surcharge on services (e.g., labor) would not be taxable, since the labor itself is not taxable.

III. CONCLUSION

In light of *Italian Colors v. Becerra* (9th Cir. 2018), California auto dealers should legally be able to impose credit card surcharges in connection with parts, service and vehicle sales transactions in which the parties do not enter into a conditional sale contract. However, there is some risk that the AG may find that the ruling does not extend to credit card surcharges imposed in a vehicle finance or lease transaction.

In addition, there are challenges with properly disclosing the credit card surcharge in a RISC, which may require DMS reprogramming and revisions to the body of the RISC to ensure proper TILA disclosures. Dealers must also work with their merchant service providers, lenders and leasing companies to comply with contractual agreements with these third parties and any procedural requirements they may impose.

ⁱ We note that CNCDA successfully lobbied for a carve-out to the new “Hidden Fees” law for vehicle dealers. Vehicle Code § [11713.27](#) was added to provide that a licensed dealer does not violate Section 1770 if it excludes from the advertised price a fee or charge identified in Vehicle Code § [11713.1](#)(b) (e.g., registration fees, document processing charges, tire fees, smog fees, and electronic vehicle registration/transfer charges).