

**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

# Memorandum

**Date:** June 9, 2023  
**To:** Anthony Bento, CNCDA  
**From:** Aaron H. Jacoby  
Lisa Singer  
Sean Wheatley  
**Re:** Credit Card Surcharges

---

The California New Car Dealers Association has requested a memo 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 or invoice and via signage displayed by the cash register. 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.

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, including by imposing surcharges "surreptitiously at the point of sale." (*Italian Colors*, 878 F.3d at p. 1176.) If a merchant fails to clearly and prominently disclose—before you pay or seek to pay for an item—what it will charge for the item, including any additional fees, that may violate California laws prohibiting deceptive or false advertising. 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)."

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. With appropriate signage and a receipt, invoice, or vehicle sale contract that itemizes the surcharge, the practice should be permissible. For parts and service sales, the sign regarding credit card surcharges should be conspicuously posted near the cashier. In the case of vehicle sales, the sign should be conspicuously posted in the showroom.

We note, however, that 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.4<sup>th</sup> 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.

### **Merchant Agreements**

Dealers will need to check each of their merchant agreements regarding limits applicable to credit card surcharges and any disclosure requirements. Maximum surcharge amounts may vary from one merchant to the next, which may require additional DMS modifications to account for these variances.

### **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](#)]

### 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.