

**House Taxation Committee  
House Bill 2316 Proponent Testimony  
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February 22, 2021**

Chairman Smith & Members of the Committee:

The Kansas Restaurant & Hospitality Association supports HB 2316 because our members would like the flexibility to assess a surcharge on credit transactions. Surcharging is legal in all but six states: CO, CT, KS, MA, ME and OK. Eliminating K.S.A. 16a-2-403<sup>1</sup> from statute is in line with most other states and eliminating the restriction will allow businesses to disclose to their customers their actual costs. .

On its face, the statutory prohibition on retail businesses disclosing their costs to transact a credit card purchase is misleading to consumers and does not serve a substantial governmental interest. Additionally, the United States Supreme Court has held these statutes, such as K.S.A. 16a-2-403, restrict a business's free speech.<sup>2</sup> Several other Courts have also reached a similar conclusion, ultimately holding these statutes to be invalid under the First Amendment. While the different cases are fact specific, the Texas, California, and Florida statutes—which all contain similar language to K.S.A. 16a-2-403—have all been found to violate the First Amendment rights of businesses.

Subsequently, several states with a similar restriction have changed their law and most recently, the Attorney General of the State of Oklahoma, Mike Hunter, offered an opinion that the Oklahoma ban on surcharges would “violate the First Amendment to the U.S. Constitution.”<sup>3</sup>The opinion is a thorough analysis and specific to Oklahoma, analyzing the combined cash and credit pricing schemes in Oklahoma's statutes; however, the opinion reaches the same conclusion we are asking this committee pursue: the restrictions on credit card surcharges violate the United States Constitution and should be eliminated.

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<sup>1</sup> **K.S.A. 16a-2-403. Prohibiting surcharge on credit or debit cards.** No seller or lessor in any sales or lease transaction or any credit or debit card issuer may impose a surcharge on a card holder who elects to use a credit or debit card in lieu of payment by cash, check or similar means. A surcharge is any additional amount imposed at the time of the sales or lease transaction by the merchant, seller or lessor that increases the charge to the buyer or lessee for the privilege of using a credit or debit card.

<sup>2</sup> *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144 (2017) (remanded to the Second Circuit to analyze the statute as a speech regulation).

<sup>3</sup>Oklahoma Attorney General Opinion 2019-12,  
[https://www.oag.ok.gov/sites/g/files/gmc766/f/documents/opinions/2020/ag\\_opinion\\_2019-12\\_v-22.pdf](https://www.oag.ok.gov/sites/g/files/gmc766/f/documents/opinions/2020/ag_opinion_2019-12_v-22.pdf)



### **Industry Q&A on Surcharging**

- Surcharging is capped at 4% by Card Brands
- Surcharges cannot be levied on debit, prepaid, or gift cards
- Surcharging is not allowed in all states (currently prohibited in CO, CT, KS, MA, ME, OK)
- A surcharge must apply to all credit transactions and card brands
- A surcharge must be shown on the receipt
- Must have signage disclosing the surcharge at the points of entry and acceptance. It is the responsibility of the merchant to post signage disclosing the program

#### **Q. Can surcharging be done in a CNP (card not present) environment? (For example, phone orders that are key-entered.)**

- Yes. Surcharging can take place on CNP transactions. Any credit card transactions key-entered into a Surcharge-enabled terminal will automatically have the surcharge applied.

#### **Q. In a restaurant environment with tip adjust, is the Surcharge applied to the total transaction amount, including tip?**

- No. In a restaurant that does Tip Adjusts after the sale, the Surcharge and program fees are based on the original Authorization amount.

#### **Q. What's the difference between a convenience fee and a surcharge?**

- Convenience fees are charges levied for the privilege of paying for a product or service using an alternative payment channel that is not standard for the merchant. For example, if the merchant primarily accepts payments in person, a convenience fee may apply if a customer pays online or over the phone. A surcharge is a fee charged to customers simply because they are using a credit card.

#### **Q. Is there any situation in which a debit card transaction can be surcharged? What about prepaid cards?**

- All debit cards and prepaid cards, no matter how transacted, are prohibited by the card brands from being surcharged.

#### **Q. Where does sales tax come in, before or after the surcharge?**

- Surcharge applies to the entire amount of any credit card transaction, including sales tax.