



THE SURCHARGE CAP

&
VISA COMPLIANCE

Legal Disclaimer

Neither this document nor the information, opinions, or ideas shared are to be considered legal advice. All parties understand that the various concepts contained require additional legal / professional advice to properly implement.

Introduction

My position has been and remains that the Durbin Amendment and, specifically, the section related to the "In-Kind Incentive" clearly protects programs such as the "Non-Cash Adjustment," in the event that such programs made their way to the courts. In addition, the Expressions Hair Design case that went all the way to the Supreme Court validated that the court believes a merchant has the right to communicate their prices however they like, provided the communication is clear.

While I am going to provide a much more practical look at the current state of Visa rules and compliance actions as well as a strong recommendation to avoid Non-Cash Adjustment and other pricing programs that add a line item to the receipt, I want to clarify first that this is a response to our current reality and runs contrary to my beliefs about what does and does not fall under the scope of what Visa is allowed to enforce.

We will take a look first at what I believe are the limitations of Visa rules as defined by several documents. This is important, because I believe these views will win out long term as this issue inevitably finds its way into legislation, new regulations or even the result of a class action that may come down the road.



A Look at the Amendment

By way of introduction and before we discuss the move to Dual Pricing, I think it would be a good idea to look back at the Durbin Amendment and the effect it has had on the popularity for programs that pass the cost of processing on to the consumer in one form or another. Here are the important sections:

“(2) LIMITATION ON RESTRICTIONS ON OFFERING DISCOUNTS FOR USE OF A FORM OF PAYMENT.—

“(A) IN GENERAL.—A payment card network shall not, directly or through any agent, processor, or licensed member of the network, by contract, requirement, condition, penalty, or otherwise, inhibit the ability of any person to provide a discount or in-kind incentive for payment by the use of cash, checks, debit cards, or credit cards to the extent that—

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“(A) IN GENERAL.—A payment card network shall not, directly or through any agent, processor, or licensed member of the network, by contract, requirement, condition, penalty, or otherwise, inhibit the ability of any person to provide a discount or in-kind incentive for payment by the use of cash, checks, debit cards, or credit cards to the extent that—

“(i) in the case of a discount or in kind incentive for payment by the use of debit cards, the discount or in-kind incentive does not differentiate on the basis of the issuer or the payment card network;

“(ii) in the case of a discount or in-kind incentive for payment by the use of credit cards, the discount or in-kind incentive does not differentiate on the basis of the issuer or the payment card network; and

“(iii) to the extent required by Federal law and applicable State law, such discount or in-kind incentive is offered to all prospective buyers and disclosed clearly and conspicuously.

“(B) LAWFUL DISCOUNTS.—For purposes of this paragraph, the network may not penalize any person for the providing of a discount that is in compliance with Federal law and applicable State law.

In this first section, notice that the practice of both “cash discounting” and the “in-kind incentive” are protected. The card brands in particular are not allowed to interfere with these practices, either directly or via their merchant contracts.

There are a few other restrictions here that are important. Notice that debit cards are specifically mentioned in two places. In section (A) you are allowed to incentivize customers to pay with a debit card, or even with a credit card. Section (i) says you cannot differentiate based on the card issuer if offering an incentive to pay with debit card. In other words, whatever the “Cash Discounting” & “In-Kind Incentives” are, they can be applied to both credit and debit cards as an incentive to pay with cash.



Here is one other important section from the Durbin Amendment regarding these programs:

“(4) DISCOUNT.—The term ‘discount’—

“(A) means a reduction made from the price that customers are informed is the regular price; and

“(B) does not include any means of increasing the price that customers are informed is the regular price.

This section makes abundantly clear that any program adding a fee to the regular price is not a “cash discount,” as defined by the Durbin Amendment. This is the rationale I used when I recommended including the “in-kind Incentive” terminology on the signage for “Non-Cash Adjustment” programs.

Having said this, understanding the rationale for some companies calling their program a “cash discount” and insisting it is compliant is also very important. Notice that this section does NOT say the regular price must be communicated on the shelf or menu. If that wording was used, non-cash adjustment programs would clearly be non-compliant. Instead, the amendment says that the regular price is whatever you have “informed” the consumer it is. You could argue that a sign at the front door and at the register are “informing” consumers of the regular price.

I should also mention that a number of laws have been passed at the state level declaring any ban on surcharging to be unconstitutional. These laws stem primarily from the Supreme Court case mentioned above. None of these laws, of which I am aware, makes any negative mention of surcharging on signature debit. Using broad strokes, these laws state that merchants have free speech rights when it comes to communicating their pricing. As long as the customer is clearly informed, merchants are not in violation of the law.

So, if the Durbin Amendment seems to protect these programs, and most state laws seem to have no issue with adding a fee to credit and debit (provided the customer is informed), what is the source of friction / controversy with these programs? **The card brands and their rules are the primary source of such issues.**

We must first understand that contracts exist between the card brands and every level of organization in the payments space - from the acquiring bank, to the registered ISO, and even to the agreement a merchant must sign to accept these cards. **These agreements include a commitment to follow card brand rules, such as the Visa surcharge rules listed below.**



(The following text is taken directly from the Visa Website at the time I created this document, but I have only included the sections I consider relevant for this conversation.)

Merchant Surcharge Q and A

- **What is a payment card surcharge?** - A payment card surcharge, also known as a checkout fee, is an additional fee that a merchant adds to a consumer's bill when he or she uses a card for payment.
- **Can I add a surcharge to card transactions?** - Merchants in the U.S. and U.S. territories may add a surcharge to credit card transactions, subject to certain limitations. Merchants who choose to surcharge must follow consumer disclosure and other requirements.
- **U.S. merchants that intend to surcharge are required to:**

- 1. Notify Visa and your acquirer at least 30 days in advance of beginning to surcharge. A notification form to Visa can be submitted at www.visa.com/merchantsurcharging.**
- 2. Limit surcharging to credit cards only (debit cards and prepaid cards cannot be surcharged) and limit the amount to your merchant discount rate for the applicable credit card surcharge*.**
- 3. Disclose the surcharge as a merchant fee and, for both in-store and online transactions, clearly alert consumers to the practice at the point of entry, the point of sale or transaction, and on every receipt. Merchants should also consider whether they comply with all applicable state and/or federal laws. Currently, several states have laws that prohibit or limit surcharging, including Colorado (prohibition effective through 30 June 2022), Connecticut, Maine, Massachusetts, and Oklahoma.**

Can I assess a surcharge on both credit and debit card purchases?

- No. The ability to surcharge only applies to credit card purchases, and only under certain conditions. U.S. merchants cannot surcharge debit card or prepaid card purchases.

Can I assess a surcharge on debit card transactions where the debit cardholder chooses “credit” on the point of sale terminal? - No. The ability to surcharge only applies to purchases made with a credit card, and only under certain conditions.



Primary Issues with “Non-Compliant Cash Discounting”

With the Visa rules around surcharging in mind, let’s review the primary issues with what Visa has termed “Non-Compliant Cash Discounting.” This includes a Non-Cash Adjustment, Service Fee or other fee added to all card transactions (including signature debit), but not to cash transactions.

As these programs began to gain momentum in 2017 and 2018, Visa crafted a Bulletin that was released on October 18, 2018, as follows:

Cash Discounting and Discount Offers Explained

U.S. | Acquirers, Processors, Agents

Visa Network



Overview: Because cash discount or discount offer programs have become increasingly popular at merchants, Visa is reminding U.S. acquirers, merchants, processors and agents that discount offer programs should be evaluated to ensure compliance with the Visa Rules.

Visa has received an increasing number of questions in relation to discount offers, or what are commonly called “cash discounts.” While there are many different programs being offered to merchants by their processors or agents, the Visa Rules on discount offers should be consulted when considering whether a program of this type would benefit the merchant.

Visa’s discount offer rule (ID#: 0008590) states that while merchants may request or encourage a cardholder to use a means of payment other than a Visa card, the method for doing so must be permitted under the Visa Rules, such as offering a discount from the merchant’s list, stated or standard price, among other possible incentives.

An example of a merchant segment that properly implements this model is automotive fuel merchants. Oftentimes there is signage at fuel merchants that clearly displays the credit price next to the discounted cash or debit price. It is important to note that the discount is taken from the regular price of the fuel, and does not constitute any additional fee or surcharge that is removed when the customer pays with cash or a debit card.

Models that encourage merchants to add a fee on top of the normal price of the items being purchased, then give an immediate discount of that fee at the register if the customer pays with cash or debit card, are **NOT** compliant with the Visa Rules and may subject the acquirer to non-compliance action.

To maintain a level playing field for all participants of the payment system, Visa actively enforces its rules pertaining to cash discount programs. Acquirers should proactively monitor the discount programs offered by their processors or agents to ensure that the programs do not violate the Visa Rules.

Their warnings are easily understood and make the “Non-Cash Adjustment” concept a clear violation of Visa rules. Also notice their reference to fuel stations and their “Dual Pricing” as the appropriate path forward for programs that were designed to incentivize consumers to use a different form of payment. We will circle back to this later.

From 2018 when this was released through the fall of 2022, there was action taken by the card brands. In fact, several large acquirers temporarily shut down their programs that fell under the umbrella of “Cash Discounting.” However, many of these same processors brought them back, as they realized that Visa had selectively enforced their rules. **This situation left many of their competitors at an unfair advantage with higher margin programs that were more appealing to both ISOs and merchants.**

“This situation left many of their competitors at an unfair advantage..”

In April of 2022, Visa crafted a much more strongly worded memo. It re-framed these programs as “Non-Compliant Surcharging” and began to pressure Acquirers to provide additional information that would allow them to better enforce their rules. **Here is a screenshot of the primary sections of this memo.**

Visa has been conducting random on-site audits of Merchants across the United States and continues to find many of them in violation of one or more of the following Visa Core Rules and Visa Product and Service Rules, related to surcharging: **US Credit Card Surcharge Requirements – US Region and US Territories** [ID# 0027539], **Notification of Intent to Assess Surcharges – US Region and US Territories** [ID# 0027544] and **Discount Offer – US Region and US Territories** (ID# 00008590).

Our research indicates an increasing number of violations to be any of, but not limited to, the following:

- Surcharge was assessed on a Debit Card transaction
- Surcharge amount exceeds cost of acceptance or super cap volumes
- Surcharge disclosure signage violations
- Merchant has not registered with Visa prior to commencing surcharging
- Non-compliant deployment of Cash Discounting

Acquirers are responsible for ensuring registered Merchants comply with the terms of their Merchant agreement, as outlined in the Visa Core Rules and Visa Product and Service Rules. Identified offenders of Visa Rules will be held accountable for violations found in market. Independent Sales Organization’s (ISOs) registered under the Acquirer, referred to as *Third-Party Agents* (TPAs) according to Visa Rules, must also meet this requirement. Although there may be no current compliance case involving one of your Merchants, Visa is requiring your organization to validate compliance of any Surcharging and Merchant Discounting practices and systems, *(used or deployed by your registered TPAs)*, are compliant with all Visa rules.

Visa retains the ability to pursue compliance action, with significant penalties for willful or significant violations, should we determine the practices or systems facilitated by the Acquirer or their TPA, are in contravention of our Rules.

Please be advised, you have **60 days from the date of this letter to conduct internal reviews and to complete and return the attached form.** In addition, each Acquirer is expected to disclose the names of their registered ISOs that offer surcharging and cash discounting to merchants, and their website address, so that Visa can confirm compliance of our Visa Core Rules and Visa Product and Service Rules, related to surcharging. If no response is received by the deadline, the first non-compliance assessment of USD 25,000 shall be assessed *(as specified in the General Non-Compliance Assessment Schedule, Rule ID# 0000482 of the Visa Core Rules and Visa Product and Service Rules*

In the fall of 2022, Visa began to take significant action to enforce their rules against non-cash adjustment and other programs that add a line item to the receipt. **Any program that is adding a fee to a transaction that does not abide by the surcharge rules is in violation of Visa rules.**

There have been unsubstantiated rumors that pressure was applied to Visa by legislators and regulators that lead to or encouraged the release of this document. As you may know, interchange fees and nearly all aspects of the payment processing industry, have been heavily regulated by most governments around the world. It is rumored that threats were made to Visa insinuating that if Visa didn't regulate its own network and ensure a transparent experience for the consumer, the government would need to step in.



This is obviously a huge concern for Visa. **If there is truth to this rumor, I believe we would all be well served to take this memo seriously.** We should consider how we can operate our businesses in such a way as to discourage a trend towards industry regulation.

As we consider the effects of this memo, we must circle back for a moment to the earlier discussion on the Durbin Amendment. **Keep in mind there is no statement in the Durbin Amendment indicating the Acquirer or ISO is protected from the card brands.** As a company offering payment processing services to merchants, a contractual relationship exists between your company and the card brands. This contract includes reference to the Visa Core rules and your agreement, not only to follow those rules but to ensure that your merchants are following them as well.

“Keep in mind there is no statement in the Durbin Amendment indicating the Acquirer or ISO is protected from the card brands.”

A Big Mistake

One of the biggest mistakes our industry made early on with programs passing processing costs to the consumer was assuming far too much liability for compliance. This was done by inserting ourselves into the scope of compliance around pricing laws/practices. **This may have been necessary as we sought to gain early momentum. However, the time has come to shift.** Shifting to a different pricing structure that Visa considers compliant, such as Dual Pricing, is necessary. We also need a new mindset concerning what is and is not within the scope of compliance for our organizations.



Compliance Scope Example

Before we dive into the new surcharge cap and Dual Pricing, let's zoom out a bit and think about the scope of compliance for our organizations.

- **Assume for a moment that you set-up your merchant on Interchange Plus Pricing with a stand-alone terminal.**
- **Imagine the merchant rang an order for a customer that included several items.**
- **However, before entering the order into the terminal, the merchant noticed the customer's clothes and car and decided an extra \$100 wouldn't be noticed.**
- **The items totaled \$556.75; the merchant rang up \$656.75 in the terminal.**
- **The customer pays the bill and later realizes what happened. A complaint is filed with the customer's issuing bank to dispute this charge.**

Is this practice by the merchant compliant? Obviously not! In fact, this action would be considered illegal under most state pricing disclosure and consumer protection laws. **Is your ISO within the “scope” of this non-compliant action? Or, in other words, does your ISO have any liability associated with this action?**

Other than the normal chargeback liability that you would plan to collect from the merchant, your ISO has nothing to do with this action. You provided a terminal, and the merchant decided to do something with that terminal that was not compliant. You did not instruct them to take this action.

“Is your ISO within the “scope” of this non-compliant action? Or, in other words, does your ISO have any liability associated with this action? “

My point, is that we need to scale back significantly the scope of compliance that we assume as it relates to merchant pricing behavior. The merchant is protected, to some extent, by the Durbin Amendment. Acquirers, ISOs, and agents are not! Understanding that every state has different laws governing pricing disclosure and consumer protection is crucial. Enforcing state pricing and disclosure laws should not be the job of payment processors, or Visa, for that matter. That is the job of the State AG.

Having said this, we now face a reality where Visa is enforcing their rules through sponsor banks and by extension ISOs. In other words, they are holding the ISO responsible for non-compliant pricing actions at the merchant location and even levying fines of \$5,000 per MID to the ISO of a merchant who remains non-compliant with Visa rules, meaning they are either adding a fee to the receipt on credit and debit, or they are using dual pricing at the register but not updating the pricing on the shelf / menu to reflect the cash and card price.

Visa Surcharge Cap

Recently, Visa released a new memo, in which they notified banks and payment processors that the cap on compliant surcharging for credit will drop from 4% to 3% on April 15th, 2023. This is important for two reasons.

First, it makes compliant surcharging even less attractive in to ISOs and Agents due to the reduced margins.

Second, it now allows Visa to take compliance actions (which will result in fines) on any receipt containing a line item increase of more than 3%, even if that receipt is for a credit transaction.

In the past, they were hampered a bit in their compliance actions because they claimed the non-cash adjustment type programs were a form of "surcharging", however as such, as long as the fee was below 4%, it was actually compliant on credit transactions, so they could only take action once they had verified that the transaction was a debit transaction and this is very time consuming as they do not have the complete card number on the receipt.

After April 15th, every receipt that they see with a line item fee greater than 3% will be an easy target for a compliance action.

With all this in mind, I believe “Dual Pricing” is still the short term path forward, but we need to be intentional about implementation of this program.

- **Not as a variant of Cash Discounting.**
- **Not as an end-to-end pricing compliance solution for every merchant in every state.**

Rather, Dual Pricing is a clear path forward as a stand-alone feature set / technology that Acquirers, ISOs, and agents can offer which puts them into compliance with Visa core rules.

Let’s take another look at the language from the Bulletin by Visa in 2018. **Here is the section that mentions fuel stations specifically:**

An example of a merchant segment that properly implements this model is automotive fuel merchants. Oftentimes there is signage at fuel merchants that clearly displays the credit price next to the discounted cash or debit price. It is important to note that the discount is taken from the regular price of the fuel, and does not constitute any additional fee or surcharge that is removed when the customer pays with cash or a debit card.

By providing the functionality to the merchant for a cash and card price, we are following specific instructions given to us by the Card Brands. Provided we keep our technology and marketing within the scope of payment processing and do not drift into complex consumer pricing laws, I believe we can provide functionality to the merchant that is compliant with both Visa rules and state laws in all fifty states.



Implementation

The vast majority of people reading this document already have a “Cash Discount” program of some kind. The most common type is a non-cash adjustment that is added as a separate line item to every card receipt, both credit and debit.

If this is the case, there is a step-by-step process that I would recommend in order to transition away from this program and avoid compliance action by your acquirer. Under each step, I have included “Defensive” actions and “Offensive” actions you should consider. I am not only recommending Dual Pricing because I believe it is a safe way to avoid compliance issues.

Step #1 - “Non-Cash Adjustment” is dead.

Defense: Unless you are planning to pitch merchants on raising their regular price on the shelf or menu and then offering a true cash discount at the point of sale, you need to remove all mention of “Cash Discounting” and “Non-Cash Adjustment” from your vocabulary, your website, your company documents, and your marketing materials.

This is the first step towards decreasing the chances of compliance action by your acquirer and/or the card brands. They are on the hunt for these types of programs. I have seen several specific examples where ISOs were targeted because of their public web pages and marketing that mentioned “Cash Discounting” and/or “Non-Cash Adjustment.”



Offense: While “Cash Discounting” has become somewhat of a buzz word in our industry, merchants have never understood the concept of providing a “discount” by adding a fee. In addition, consumers seem to be significantly more likely to file a complaint with their bank when they see a line item fee added to their receipt on a debit transaction. By contrast, they seem much less likely to do so when they see a receipt without such a line item and only a mention of the “Card Price” total.

Also, keep in mind that there are hundreds of thousands of merchants at this point who are running a non-cash adjustment type program. These merchants may love the concept in general. But you may persuade them to switch processors if you can show that Dual Pricing is not only considered a compliant solution by the card brands, but - more important to them - their customers will have a better experience.

There will be a significant shift in the market over the next 24 months. The sooner you embrace this new direction, the sooner you will be able to take advantage of this shift.

Step #2 - Remove the Line Item.

Defense: By the time you read this, it is possible that your technology provider will already have a dual price feature. However, it is important to note that the most important action you can take to avoid customer complaints that turn into compliance issues is to remove the line item from the receipt.

Even if you intend to continue offering a program that does not differentiate a cash / card price, there is really no reason to display the non-cash adjustment as a line item on the receipt. Itemizing it on the receipt is a requirement for compliant surcharging, as we mentioned above. Thus, you are only proving to the card brands that your program is a surcharge by adding a separate line item.

Since you are likely adding this fee to debit transactions and since the fee is likely greater than the new 3% cap, this means you are offering a non-compliant surcharge program in violation of the card brand rules you agreed to follow when you became an Agent / ISO.

Offense: When you speak with merchants who claim to be passing the cost of processing on to the consumer or paying no processing fees, ask them if they have a line item on the receipt that is greater than the new cap of 3% and if they are adding this line item to all cards. Have marketing information ready that explains Visa rules with direct links to the Visa website. Explain to them that while you personally support their right to free speech and believe they should be free to communicate their price any way they please, the card brands do not agree. They are sending out mystery shoppers for enforcement.

Does the merchant really want to get into a fight with Visa, when they could implement a program like Dual Pricing that has been around for 50+ years at fuel stations? Dual Pricing has the exact same economics as their current program, without the card brand compliance headaches. Pairing this line of logic with a pitch for an improved customer experience is very powerful over the phone or in person.



Step #3 - Provide Dual Pricing FUNCTIONALITY.

Defense: Notice I did NOT say, implement dual pricing for the merchant. Unless you plan to hire a team of attorneys and create specific guidance in each state customized for various merchant types and settings, I would advise scaling back your intended goal. Your objective is to provide functionality for dual pricing at the register. This is the entire scope of compliance for your organization.

***Keep in mind that Visa currently disagrees with the section above and does hold the sponsor bank and ISO accountable for merchants who implement dual pricing at the register, but not on the shelf. I will address this at the bottom in the section on the Amendment to include and how to respond to the card brands.

One helpful example here is to think about a payroll provider. My company outsources payroll processing to a third party. Never once has this payroll provider asked me for, or offered assistance with, my recruiting processes. How do they know that my company is not breaking the law as it relates to hiring practices? Are they certain I am paying my employees according to all relevant state and federal laws? No, they have no idea.

It is my company's responsibility to research the relevant laws governing my hiring practices and to engage an attorney or HR professional when necessary. The payroll processing company is providing me with functionality and services that allow me to pay my employees. That's it.

In this same way, I would encourage you to provide technology solutions that display both a cash and card price. The merchant must enter a single price into the terminal. Therefore, the cash price seems to be the most obvious, since many merchants may choose to leave their pricing on the shelf and menu alone. So, you should provide a simple solution that allows the merchant to enter a cash price into the terminal. Then the terminal should gross up the card price according to the instructions provided by the merchant.

Side note: This is one reason I am a fan of “Share the fee” options where the merchant has the choice of passing all or only a portion of the processing fees on to the consumer. This further distances your organization from the compliance aspect. You are telling the merchants that you charge 4% payment processing fees for this program. It is up to them how much of a variance they choose between the cash price and the card price. They may pass 2%, 3% or 4% on to the consumer. This is their choice; you are only offering them the necessary technology.

Offense: When offering something new, tie it to something old, established, and accepted. In this case, explain that the terminal will display both a Cash and Card price, just like the sign at many fuel stations they might visit. They may choose to turn the terminal around to the consumer and have them choose the option they want. They may ask verbally, “Are you paying with Cash or Card?” This is their choice. Merchants will intuitively grasp this concept.

Step #4 - Provide a new, SIMPLE sign.

Defense: Fortunately, this is one area where dual pricing is much simpler than non-cash adjustment. Because you are not in control of or involved in the choices your merchant will make in terms of pricing display on the shelf or menu, the sign you provide should be very simple. We are not trying to make a sign that looks like it was created by a payment processor. We are creating a sign that a merchant would choose to display.

Offense: Merchants will love a simple sign. Here is my currently recommended language. Prepare to be unimpressed...

We offer our customers a Card Price and a discounted Cash Price.
Thank you for your business!



Step #5 - Formalize the shift in compliance responsibility.

This final step will create a clear line showing where your involvement ends and where the responsibility of the merchant begins. Create an additional page / terms / Addendum that you add to your merchant agreement when the merchant chooses a dual price program. This document makes it clear that while your technology and the related functionality you are providing to the merchant is a compliant version of dual pricing, the merchant accepts responsibility for adhering to all state, local, and federal laws related to pricing disclosure and consumer protection.

This document should also make it clear that while you are providing technology solutions to the merchant, they have the freedom to turn on and turn off certain pricing features based on their needs and specific, local laws that may impact consumer disclosure. Make it clear that your organization considers it “best practice” to clearly list the cash and card price wherever the price is listed, but make it clear that the merchant, by signing this document, agrees to implement this pricing program on their own as it relates to physical shelf and menu pricing as well as marketing and other areas where a price may be listed.

By having the merchant sign this document, you are, in effect, creating a silver bullet for future issues that may arise with the card brands concerning an individual merchant account.

Let's assume that you have a particular retail merchant that does not list the cash and card price on the shelf. A consumer or Visa mystery shopper files a complaint because the shelf listed only the cash price. But when the shopper came to the register, a higher price was charged.

In the event that Visa reached out claiming that you were offering a non-compliant program, you would provide Visa with a copy of the letter signed by the merchant. This letter would prove that the scope of your program extends only to the functionality on the technology solution and even there, you give the merchant a choice in terms of what features are enabled.

Visa would have no choice but to either notify the merchant individually, or refer this issue to the State AG's office. Visa does not seem to have any desire to engage with merchants directly over specific pricing practices, unless those practices relate directly to the checkout process. If the State AG follows up with the merchant, these notices generally provide ample time to make adjustments.

Side Note: I am not advocating we leave the merchant hung out to dry. Quite the opposite. **The merchant is in a much stronger position to defend their free speech rights than the ISO is to defend a program that is in violation of Visa core rules.**

When a merchant does reach out regarding notices by their State AG or the card brands, it is obviously in our interest to help the merchant. These situations will be rare, but in these cases we can explain that their particular state seems to be more stringent than others, and / or that the card brand rules are constantly changing and it appears that their shelf / menu pricing is not compliant. They have four options.

- **They can change the pricing on their shelf / menu to reflect dual pricing.**
- **They can implement compliant surcharging.**
- **They can return to Interchange Plus Pricing.**
- **They can find a different payment processor. (You cannot afford the financial liability of keeping a merchant on your books with a pricing program that Visa has determined is non-compliant. Recent experience tells me that you will be fined.)**

When a merchant does reach out regarding notices by their State AG or the card brands, it is obviously in our interest to help the merchant. These situations will be rare, but in these cases we can explain that their particular state seems to be more stringent than others at this time. They have three options.

Liability Document Bullet Points

Since I am not an attorney, I have decided not to provide specific language for this document. However, I have provided a list of bullet points below that you should discuss with your attorney in the creation of this document.

- **Description of program functionality and mention of dual pricing concept.**
- **Clarification that the signs provided are recommended language. The merchant accepts responsibility for any specific disclosure requirements his/her state may have.**
- **Clarification that your company's role is to process payments for the merchant and provide functionality to facilitate this, including dual pricing functionality, should the merchant choose to activate this functionality.**
- **Acknowledgement that a variety of Federal, State, and Local laws exist pertaining to pricing, disclosure, and consumer protection. The merchant is responsible for following these laws.**
- **Acknowledgement that the card brands have various rules that may govern pricing display and decisions outside the scope of the technology / functionality your company is providing. The merchant is responsible for following these rules.**
- **Clarify that while the merchant is responsible for the items above, you are not empowered to "require" them to take any action as it relates to their pricing. Therefore, your company has no enforcement duties in terms of the merchant's choices around pricing and disclosure.**

Closing

We are at a point where Visa is going to fine you for merchants who are not compliant with Visa rules. I believe that within 12 months, you will receive a compliance action notice on at least 1% of your portfolio or 1 out of every 100 merchants and this number could be significantly higher if Visa determines that your program is not compliant and sends mystery shoppers to your merchant locations.

While I do not believe it is time to abandon Dual Pricing, I do believe it is time that we recognize the current reality of Visa compliance actions and the resulting fines inherent with these actions. It is time to take action. Remove your line item programs from the receipt, they are clear red flag, especially with the new 3% cap on compliant surcharging. Adopt dual pricing, but also ensure that your merchants sign a document shifting the burden of shelf and menu pricing to them.



Long term, I am working on a variety of strategies to push back against these actions by Visa and I fully intend to work with my friends in the industry to make long term progress in the effort to both protect the free speech rights of merchants as well as remove the burden of enforcement of all Visa rules from our industry. However, in the short term, Visa has all the leverage, and we need to recognize our place in the industry as “game players” not “rule makers.”

While I believe this document is a great resource for those of you considering a transition to dual pricing, I believe the overall emotion I have communicated may be more negative than positive. **Let me spend this last paragraph providing a version of current reality that I believe captures the opportunity this shift presents.**

The card brands have rules. **They expect our industry to follow those rules.** They expect merchants to follow their rules. They expect our industry to enforce compliance. Dual Pricing is a program with identical economic benefit to the legacy “Cash Discount” programs that the card brands consider compliant. Merchants intuitively understand Dual Pricing much better than non-cash adjustment. Consumers seem significantly less likely to complain about or have a negative experience from Dual Pricing. Several large acquirers have been running Dual Pricing programs for years with high retention rates and minimal loss in margin.

This is a huge opportunity! Let’s pivot and continue to grow.

James Shepherd