

**AMERICAN EXPRESS TESTIMONY ON SB 91
COLORADO HOUSE OF REPRESENTATIVES
COMMITTEE ON BUSINESS AFFAIRS & LABOR
MAY 26, 2021**

American Express appreciates the opportunity to comment on SB 91. This bill would modify longstanding law that protects Colorado consumers, small business owners and government agencies from having to pay a surcharge when they elect to pay for goods or services using a credit card. American Express has concerns about the engrossed bill as currently drafted. We respectfully highlight two areas and recommend the following changes to improve the bill.

1. Credit card surcharges should be capped at a reasonable level

The introduced version of SB 91 sought to cap surcharges at 2% of the transaction amount. In the engrossed bill, that 2% cap can be ignored in favor an alternative option – to surcharge the full “merchant discount fee” that the seller or lessor pays to accept a credit card payment, inclusive of any fees that may be imposed by other parties besides the card network. In effect this means there would be no statutory cap on the amount of surcharge. A “service provider” (not defined in the bill) “shall” calculate the surcharge on behalf of the merchant under this scenario. No similar law exists in any state.

American Express respectfully recommends striking proposed subsections 5-2-212(1)(c)(II)(A), (B) and (C) from the engrossed bill (page 3, line 9 through page 4, line 6). Alternatively, the engrossed bill should be amended on page 2, line 15, by striking the words “pursuant to” and inserting “not to exceed the lesser of” in their place. In either case, SB 91 would allow credit card surcharging in Colorado up to 2% of the transaction amount in 5-2-212(1)(c)(I), consistent with the original bill.

2. The legislation should not intrude on voluntary, business-to-business contracts

American Express objects to paragraph (4) on page 5, lines 5-8 of the engrossed bill:

(4) ANY CONTRACT OR AGREEMENT THAT A SELLER OR LESSOR
ENTERS INTO ON OR AFTER THE EFFECTIVE DATE OF THIS SUBSECTION (4)
THAT PERTAINS TO THE PROCESSING OF CREDIT OR CHARGE CARDS MUST
COMPLY WITH THIS SECTION.

This paragraph was similarly incorporated into engrossed SB 91 after not featuring in the introduced bill. It is unusual, unwarranted and unlike similar law in any state. It limits the freedom of merchants and payment processing services to contract on terms that are mutually beneficial.

American Express competes in a marketplace for payment card processing services in Colorado that is competitive and robust. Our contracts offer value and choice to merchants, many of whom demand negotiated terms or may choose not to accept our Cards. We do not observe evidence of marketplace failure or abuses to justify intruding on freely negotiated, business-to-business contracts between merchants and financial institutions.

American Express respectfully recommends striking paragraph (4) in its entirety. Alternatively, we recommend inserting a new sentence at the end of paragraph (4): “The provisions of this subsection do not apply to a bank or its affiliates.”

Conclusion

American Express believes that uncapped credit card surcharging may result in distortions and harmful, unintended consequences. As currently drafted, its impacts would fall most directly on Coloradans who rely on credit cards to make purchases – consumers, small business owners, state and local government agencies. Surcharges could be imposed at wholesale and again at the retail level, creating a pyramiding effect. Surcharges could also be imposed in situations where other methods of payment are impractical or impossible, such as for online commerce, payment of a security deposit, or an after-hours fill-up at the gas pump.

Engrossed SB 91 takes no account of costs associated with transacting other payment methods besides credit (notably, debit card surcharges are explicit prohibited by the legislation, which is striking given its purposeful repeal of the credit surcharge ban). If this current bill becomes law without amendments, credit card users in Colorado may be required to shoulder up to 100% of merchants’ transaction costs on top of the price of goods and services, while customers using other payment methods would pay nothing. There is no obvious public policy justification for this.

No state has enacted a law resembling engrossed SB 91. The impact of this legislation could be especially dramatic in Colorado, where credit card surcharging is now prohibited by law and has been for nearly four decades.

American Express appreciates the opportunity to comment on this legislation.

May 26, 2021

Chair Dylan Roberts
Business Affairs and Labor Committee
Colorado House of Representatives
200 E Colfax Ave
Denver, Colorado 80203

Re: Senate Bill 21-091

Dear Chairman Roberts and Distinguished Members of the Business Affairs and Labor Committee,

On behalf of the Electronic Transactions Association (“ETA”), thank you for the opportunity to provide comments on SB21-091, which would allow merchants to impose a surcharge on persons who elect to pay for sales or lease transactions by using a credit or charge card. As a practice, ETA does not take a position on the issue of surcharges as a matter of policy. However, we have outlined suggestions below we believe could improve the implementation and administration of the legislation should it become law.

These issues are addressed by amendment L.006, which will be offered by the sponsors today, and we encourage the committee to adopt this amendment.

ETA is the leading trade association for the payments industry, representing over 500 companies that offer electronic transaction processing products and services. ETA’s members include all parts of the electronic payments ecosystem including financial institutions, acquiring banks, merchant service providers and processors, and payment card networks. ETA member companies are creating innovative offerings in financial services, revolutionizing the way commerce is conducted with safe, convenient, secure, and rewarding payment solutions.

Contractual Compliance Provision

As currently drafted, SB21-0921 includes a provision that requires “any contract or agreement that a seller or lessor enters into ... that pertains to the processing of credit or charge cards must comply” with the requirements of the legislation. This provision is vague, and its value is dubious. Under Colorado and all other states’ common law, contractual obligations that violate laws, i.e. illegal contracts, are unenforceable; for practical purposes, all contracts must comply with relevant state laws. In addition, such a requirement would be very burdensome and time intensive as it would likely require our members to attempt to negotiate separate contractual terms for Colorado sellers and lessors. Accordingly, ETA strongly urges the committee to adopt amendment L.006, which resolves this issue.

Disclosure Signage

SB21-0921 also includes a provision requiring sellers and lessors post signage both on their premises and for online sales. ETA urges the committee to strike this requirement from the bill. In our experience these sorts of signs do not provide meaningful disclosure to consumers at the point of sale. Given today’s technological advances, the typical purchase experience (whether online or

in person) is highly streamlined, often lasting for mere seconds. Whether online or in person context, consumers are interested in transacting for their goods and services and going about their business and do not pay attention to legal verbiage on walls in the background.

* * *

We appreciate you taking the time to consider these important issues. If you have any questions or wish to discuss any aspect of our comments, please contact me or ETA Senior Vice President, Scott Talbott at Stalbott@electran.org.

Respectfully Submitted,



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The Bell Policy Center

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Amend: Credit Transaction Charge Limitations (SB21-091)

Testimony to House Business Affairs & Labor Committee

Andrea Kuwik, Policy Analyst • May 26, 2021

Thank you for the opportunity to submit written testimony for SB21-091. My name is Andrea Kuwik, and I'm a policy analyst with the Bell Policy Center. The Bell Policy Center provides policymakers, advocates, and the public with reliable resources to create a practical policy agenda that promotes economic mobility for every Coloradan.

The Bell is an amend position on SB21-091. We appreciate the stated intent of this bill: to help businesses, especially smaller ones, who, currently, are largely responsible for absorbing credit card transaction costs. However, we are deeply concerned about the bill's unintended consequences for the many Coloradans who use credit to pay for essential, expensive items such as medical bills, housing, and child care.

For too many Coloradans, there's a direct line between the use of credit and financial precarity. For example, we know:

- [Nearly 30 percent of Coloradans](#) live between poverty and the middle class, a perilous position where one crisis can lead to economic calamity and a struggle to pay for basic necessities.
- Nearly one-quarter of all Coloradans have at least some [debt in collections](#).

While financial uncertainty existed for many before COVID-19, it's likely these conditions have worsened over the past year. As of September, our state had the [third highest](#) percentage of residents who took on debt to make ends meet. Additionally, a [March 2021](#) report by the Federal Reserve Bank of Philadelphia estimates 1.8 million households continue to owe approximately \$11 billion in rent–debt that is the disproportionate responsibility of women and individuals of color.

We're concerned that if this bill passes, a greater financial burden will be placed upon already economically vulnerable Coloradans who have little choice in how they pay for necessary items.

Reporting suggests, credit remains an essential way to afford basic necessities. For example:

- A [2019 study](#) finds one-third of those with credit cards were in debt because of medical costs. Concerningly 60 percent of these individuals report using a credit card because they lack alternative ways to pay their medical bills.
- Between October of 2019 and October of 2020, the number of individuals using credit cards to pay rent increased by [nearly 70 percent](#).
- A recent national study finds [45 percent of parents](#) who are planning to use child care this coming summer will put this expense on their credit card.

Despite our concerns, we believe there are ways to preserve this bill's intent while also protecting vulnerable families. Specifically, we ask the committee to consider amending the bill to:

- 1.** Exempt medical, rental, and child care transactions from credit card surcharges;
- 2.** Allow surcharges to be applied on goods, but not the exchange of services; or
- 3.** Cap the dollar amount that can be collected through the surcharge on all transactions

Thank you again for the opportunity to submit written testimony, and we respectfully ask the committee to consider the above suggestions as a way to support both businesses and those who are economically vulnerable.