Office of Consumer Credit Commissioner

Leslie L. Pettijohn
Commissioner

2601 N. Lamar Blvd.
Austin, TX 78705
www.occc.state.tx.us

512-936-7600
Fax: 512-936-7610
Consumer Helpline: 800-538-1579

Interpretation No. 2011-01

December 16, 2011

Mr. Brian C. Potter
Beatty Beagle Strama, P.C.
400 West 15th Street, Suite 1450
Austin, TX 78701

Mr. Potter,

Section 339.001 of the Texas Finance Code prohibits merchants from imposing a surcharge for the use of a credit card. You requested an interpretation of this section from the Office of Consumer Credit Commissioner (OCCC). Your request includes two questions:

1. Is a debit card that can trigger access to an "open-end" account such as a line of credit, or a "margin" account considered a "credit card" as contemplated by section 339.001 of the Texas Finance Code?
2. If a retailer places a surcharge on a transaction on a card that can trigger access to an "open-end" account, regardless of whether it is processed as "debit" or "credit" card transaction, is the retailer in violation of section 339.001 of the Texas Finance Code, and subject to penalties?

Summary

For purposes of the credit-card-surcharge prohibition in Section 339.001, a credit card is a payment device that accesses extensions of credit from an open-end account. A so-called "debit card" may function as a credit card if it meets this definition. If a merchant imposes a surcharge for the use of a card that functions as a credit card, then the merchant violates Section 339.001. In this situation, the Finance Commission of Texas would be able to assess an administrative penalty against the merchant. The distinction between credit cards and debit cards creates certain challenges, and merchants should take care to ensure that they do not impose a surcharge for the use of a card that functions as a credit card.

Therefore, the answer to the first question is yes—assuming the card accesses extensions of credit from an open-end account. The answer to the second question depends on whether the card functions as a credit card in the *specific* transaction where the surcharge is imposed, not on whether the card can *generally* trigger access to an open-end account.

Definition of "credit card" and distinction from debit cards

The Texas Finance Code (Finance Code) prohibits credit card surcharges: "In a sale of goods or services, a seller may not impose a surcharge on a buyer who uses a credit card for an extension of credit instead of cash, a check, or a similar means of payment." Tex. Fin. Code Ann. § 339.001(a) (West 2006). By its language, this section applies only to transactions involving credit cards. Whether a card is a credit card depends on whether it accesses an extension of credit, and what type of account it accesses.

The legislative history of Section 339.001 suggests that when the Texas Legislature enacted the credit-card-surcharge prohibition, it intended for the prohibition to apply to "credit card transactions," as that term was defined in the predecessor statutes to the Finance Code. The Legislature chose to use the phrase "credit card" and to place the provision near other provisions relating to credit card transactions. *See* House Comm. on Fin. Insts., Bill Analysis, Tex. S.B. 1353, 69th Leg., R.S. (1985) ("Current law relating to sales transactions involving the use of a credit card, codified at Article 5069-1.01 *et seq.*, V.T.C.S., does not expressly prohibit a seller from imposing a surcharge on the buyer because the buyer uses a credit card instead of cash, a check or similar means of payment."). Therefore, the OCCC will use the Finance Code's definition of "credit card transaction" as guidance in defining "credit card."

The Finance Code defines "credit card transaction" as "a transaction for personal, family, or household use in which a credit card, plate, coupon book, or credit card cash advance check may be used or is used to debit an open-end account in connection with: (A) a purchase or lease of goods or services; or (B) a loan of money." Tex. Fin. Code Ann. § 301.002(2) (West 2006). The Finance Code also provides that the phrase "open-end account":

> (A) means an account under a written agreement between a creditor and an obligor in connection with which:
> (i) the creditor reasonably contemplates repeated transactions and the obligor is authorized to make purchases or borrow money;
> (ii) interest or time price differential may be charged from time to time on an outstanding unpaid balance; and
> (iii) the amount of credit that may be extended during the term of the account is generally made available to the extent that any outstanding balance is repaid; and
> (B) includes an account under an agreement described by Section 342.455 or Chapter 345 or 346.

Id. § 301.002(14). In other words, the Finance Code provides that in a credit card transaction, the debtor accesses an extension of credit from an open-end account. An open-end account allows the creditor to charge interest and provides for repeated extensions of credit during the account's term. *See also Eaves v. Unifund CCR Partners*, 301 S.W.3d 402, 408 (Tex. App.—El Paso 2009, no pet.) (describing the elements of an "open account").

By contrast, a debit card is a payment device that accesses funds from an asset account or deposit account.[1] The Finance Code does not define "debit card," but there is a definition in the federal Dodd–Frank Act, which provides that the term "debit card" means "any card, or other payment code or device, issued or approved for use through a payment card network to debit an asset account . . . [but] does not include paper checks." Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010 § 1075(a)(2), 15 U.S.C. § 1693o-2(c)(2) (Supp. IV 2010). This definition appears in the Dodd–Frank Act's debit-interchange-fee provisions, which are implemented by the Federal Reserve Board's recently adopted Regulation II. In the preamble to Regulation II, the Board interprets "asset account" to include demand deposit accounts, transaction accounts, and savings accounts. Debit Card Interchange Fees and Routing, 76 Fed. Reg. 43,394, 43,405 (July 20, 2011).

In short, credit cards can be distinguished from debit cards based on the type of account they access. Credit cards access funds from open-end accounts (which create extensions of credit in multiple transactions), whereas debit cards access funds from asset accounts (including demand deposit accounts and savings accounts). The OCCC has made this distinction in three official interpretations. The agency held that certain debit card transactions were not subject to provisions applying only to credit card transactions, either because there was no extension of credit or because funds were not accessed directly from an open-end account.

In a 1983 interpretation, the OCCC held that certain debit and credit agreements were not "lender credit card agreements," and that the use of the associated debit card was not a "credit card transaction." Tex. Consumer Credit Comm'r Interp. No. 83-6 at 5–6 (1983). The debit agreement at issue allowed a customer to use a debit card to withdraw money from a deposit account at ATMs. *Id.* at 1. A separate credit agreement provided that if the account's balance went below an amount specified by the consumer, the bank would put money in the deposit account in $100 increments, drawing on an open line of credit. *Id.* at 2. However, a customer would not be able to overdraw the account at an ATM (as long as the ATM was online). *Id.* at 3. The agency applied the definition of "credit card transaction" in the predecessor statutes to the Finance Code, noting that "those transactions can be described as revolving open-end accounts which open-end accounts are or may be debited by using a credit card for loans or purchases which are for personal, family, or household use." *Id.* at 5. The agency also noted that the Legislature intended the provisions on credit cards to apply to "only those types of credit in connection with which the cardholder is issued a typical credit card." *Id.* Because the debit card could not be used to obtain an extension of credit, the agency held that the use of the debit card was not a credit card transaction. *Id.*

---

[1] The terms "asset account" and "deposit account" appear to be used interchangeably, referring to roughly the same type of account. The Federal Deposit Insurance Act generally uses the term "deposit account" to describe accounts insured by the FDIC. *See, e.g.*, 12 U.S.C. § 1813(l)(1) (2006). The FDIC distinguishes among several different deposit types, including checking accounts, savings accounts, certificates of deposit, and money market deposit accounts. FDIC Glossary, *available at:* https://www.fdic.gov/edie/glossary.html. Similarly, under the Uniform Commercial Code, a deposit account is "a demand, time, savings, passbook, or similar account maintained with a bank . . . . includ[ing] a nonnegotiable certificate of deposit." Tex. Bus. & Comm. Code Ann. § 9.102(29) (West 2011). In this interpretation, the term "asset account" will be used to refer to this class of accounts.

In another 1983 interpretation, the agency went somewhat further, holding that a certain type of debit card transaction was not a credit card transaction even though it involved extensions of credit. Tex. Consumer Credit Comm'r Interp. No. 83-9 at 5 (1983). The debit agreement at issue allowed a customer to use a debit card to withdraw money from a deposit account at ATMs. *Id.* at 1. A separate Overdraft Protection plan provided that if the customer overdrew the deposit account, money would be advanced to the deposit account from a line of credit. *Id.* at 2. Unlike the agreement discussed in the previous paragraph, this agreement allowed a customer to activate Overdraft Protection by using the debit card at an ATM. *Id.* at 3. Because the debit card caused a withdrawal from the deposit account, rather than an open-end account, the agency held that the transaction did not satisfy the definition of a "credit card transaction." *Id.* at 4.

In a 1984 interpretation, the agency came to a similar decision. Tex. Consumer Credit Comm'r Interp. No. 84-10 at 5 (1984). The credit and debit agreements were similar to the ones discussed in the previous paragraph, but they also imposed monthly service charges for the use of the checking account and the debit card. *Id.* at 1–3. The agency held that these fees did not violate certain statutory provisions limiting fees for credit card transactions. *Id.* at 4–5. The agency also held that the use of the debit card was not a credit card transaction. *Id.* at 5.

When read together, these three interpretations provide a cogent way to determine whether a transaction is a credit card transaction. The OCCC has consistently held that the credit card provisions in the Finance Code's predecessor statutes did not apply unless: (1) the card is used to debit an open-end account, and (2) the transaction creates an extension of credit.

Several other sources distinguish between debit cards and credit cards on a similar basis. For example, the Federal Reserve Board's official interpretations of Regulation Z state that a credit card "does not include . . . [a] check-guarantee or debit card with no credit feature or agreement, even if the creditor occasionally honors an inadvertent overdraft." Official Staff Interpretations of Regulation Z, 12 C.F.R. pt. 226 supp. I § 226.2(a)(15)2.ii. (2011). Similarly, the Board's official interpretations of Regulation E look to the type of account accessed to determine whether a card is a credit card or a debit card (and therefore which liability provisions apply). Official Staff Interpretations of Regulation E, 12 C.F.R. pt. 205 supp. I § 205.12(a)1. (2011). In addition, a federal court in Texas held that the Electronic Funds Transfer Act did not apply to certain credit card transactions, noting that "[c]harges to a credit card, unlike transactions using a debit card, do not involve transfers from a consumer's bank account." *In re Vistaprint Corp Mktg. & Sales Practices Litig.*, No. MDL 4:08-md-1994, 2009 WL 2884727, *8, 2009 U.S. Dist. LEXIS 77509, *25 (S.D. Tex. Aug. 31, 2009); *see also Sanford v. Memberworks, Inc.*, 625 F.3d 550, 560 (9th Cir. 2010) (dismissing a claim under the EFTA where the plaintiff used only a credit card, not a debit card). All of these sources suggest that credit cards can generally be distinguished from debit cards.

In light of the OCCC's previous interpretations and other sources of law, the agency's opinion is that Section 339.001 prohibits a surcharge for credit card transactions only, not for debit card transactions. However, if a so-called "debit card" *actually functions* as a credit card in a transaction, then Section 339.001 prohibits a surcharge in that transaction.

Challenges in distinguishing between credit cards and debit cards

In certain situations, it may be difficult for merchants to determine whether a card is a credit card or a debit card—some cards may be used as either. The Finance Code's surcharge prohibition applies only to cards used as credit cards. A merchant that wishes to impose a debit card surcharge should ensure that the surcharge applies *only* to cards used as debit cards.

If an electronic keypad allows a customer to process a debit card transaction as a "signature debit" transaction (where the customer signs the pad but does not provide a PIN number), then the transaction may appear identical to a credit card transaction. In addition, the distinction might be difficult if the debit card can be used to trigger an extension of credit directly from an open-end account—that is, the card can be used as a credit card. Conceivably, a debit card agreement could provide that if a customer attempts to pay an amount greater than the customer's asset account balance, the amount will be drawn from an open-end account, with no impact on the asset account. This would distinguish the agreement from those discussed in Interpretations 83-9 and 84-10, which provided that the funds would first be advanced to the asset account before being withdrawn.

The Federal Reserve Board has acknowledged the possibility that a card may be used as both a credit card and a debit card. The distinction is significant because credit card transactions are subject to the Truth in Lending Act and Regulation Z, whereas debit card transactions are subject to the Electronic Funds Transfer Act and Regulation E. A recent amendment to the Regulation Z official interpretations acknowledges that "if [an overdraft] line of credit can also be accessed by a card (such as a debit card), that card is a credit card." Truth in Lending, 76 Fed. Reg. 22,948, 23,005 (Apr. 25, 2011) (to be codified at 12 C.F.R. pt. 226 supp. I § 226.2(a)(15)2.ii.C.). Similarly, the official interpretations of Regulation E describe the following scenario: "A consumer has a card that can be used either as a credit card or a debit card. When used as a debit card, the card draws on the consumer's checking account. When used as a credit card, the card draws only on a separate line of credit." Official Staff Interpretations of Regulation E, 12 C.F.R. pt. 205 supp. I § 205.12(a)1.ii.A. (2011). The interpretations go on to state that Regulation E's liability provisions apply when the card is used as a debit card, whereas Regulation Z's provisions apply when it is used as a credit card. *Id.* Under these interpretations, the applicability of credit card provisions depends on how the card is used, which in turn depends on what type of account the card accesses.[2] A merchant that wishes to impose a debit card surcharge should account for this issue.

[2] Along similar lines, the Texas Department of Savings and Mortgage Lending allows savings associations and savings banks to offer overdraft protection for demand deposit accounts, using credit cards on an open-end credit plan. 35 Tex. Reg. 11,852 (2011) (to be codified as amendments to 7 Tex. Admin. Code §§ 67.16, 77.113) (Tex. Dep't of Sav. & Mortg. Lending). Like the Federal Reserve Board's interpretations, these rules suggest that a card is a credit card when it directly accesses an open-end account, even though the extension of credit relates to an overdraft of an asset account (in this case, a demand deposit account).

Administrative penalty for imposing a credit-card surcharge

As discussed above, if a merchant imposes a surcharge for the use of a card that functions as a credit card, then that merchant violates Section 339.001 of the Finance Code (even if the card is labeled as a debit card). In this situation, the Finance Commission of Texas would be able to assess an administrative penalty against the merchant.

Section 339.001 gives authority to the Finance Commission of Texas to enforce the credit-card-surcharge prohibition: "The Finance Commission of Texas shall have exclusive authority to enforce and adopt rules relating to this section." Tex. Fin. Code Ann. § 339.001(c) (West 2006). The power to "enforce" the section includes the power to assess an administrative penalty against a merchant who violates the section. *See Dozier v. City of Gatesville*, 51 S.W.2d 1091, 1094 (Tex. Civ. App.—Waco 1932, no writ) (quoting 20 C.J. 1256 (1920)) ("Enforce in general means to cause to be executed or performed; to cause to take effect; to compel obedience to; to put in force."). Therefore, the Finance Commission of Texas could assess an administrative penalty against a merchant that imposes a credit card surcharge.

Section 339.001 also provides: "This section does not create a cause of action against an individual for violation of this section." Tex. Fin. Code Ann. § 339.001(c) (West 2006). This means that a customer would not be able to sue a merchant in a civil court for imposing a credit card surcharge.

Conclusion

For the reasons discussed above, the OCCC's opinion is that Section 339.001 of the Finance Code prohibits merchants from imposing surcharges in all transactions where a card functions as a credit card (even if the card is labeled as a debit card). A card functions as a credit card if it accesses extensions of credit from an open-end account. If a merchant imposes a credit card surcharge, then the Finance Commission of Texas may assess an administrative penalty against the merchant.

Pursuant to Section 14.108(a) of the Texas Finance Code, on December 16, 2011, the Finance Commission of Texas approved this interpretation of Section 339.001 of the Finance Code.

Sincerely,

Leslie Pettijohn
Consumer Credit Commissioner