TEXAS OFFICE OF CONSUMER CREDIT COMMISSIONER

Credit Card Surcharge Advisory Bulletin: Alternatives to Credit Card Surcharges

Section 339.001 of the Texas Finance Code prohibits credit card surcharges. This bulletin describes five alternative pricing practices that are not prohibited credit card surcharges.

Section 339.001(a) of the Texas Finance Code provides: "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." There are five main alternatives to a prohibited credit card surcharge: (1) uniform pricing, (2) a uniform convenience fee, (3) a cash discount, (4) an option to pay by credit card with no fee, and (5) a third-party payment processor.

1. Uniform pricing with no surcharge, fee, or discount

The most straightforward way to comply with Section 339.001 is to charge the same price to all buyers, regardless of how they pay. Under this method, the seller simply sets and charges a regular price for the good or service (plus sales tax), without any additional surcharge, fee, or discount based on the buyer's form of payment.

2. Uniform convenience fee

Section 339.001 does not prohibit fees that are uniform for all forms of payment, whether these fees are labeled "convenience fee," "service fee," or something else. A convenience fee that is uniform for all forms of payment is not a prohibited credit card surcharge.

The Texas attorney general reached this conclusion in Opinion No. GA-0951 (2012). The attorney general held that Section 339.001 does not prohibit a seller from imposing a standard, properly disclosed "service fee" for all transactions over $10. This conclusion was based on the assumption that the service fee was not "limited to consumers who pay with a credit card."

In order to be authorized, the fee must be truly uniform for all forms of payment. A seller may not charge a fee that results in a buyer paying more to use a credit card compared with any other form of payment. The fee must also be disclosed to the buyer before the transaction.

3. Cash discount

Section 339.001 prohibits surcharges for paying by credit card, but it does not prohibit discounts for paying by cash, check, debit card, or other methods. A surcharge is an increase from the regular price of a good or service, but a discount is a decrease from the regular price.

The federal Truth in Lending Act allows sellers to have two prices (one for cash and one for credit), as long as the credit-card price of the good or service is also the regular price. 15 U.S.C. §§ 1602(q), (r), (y), 1666f.

A seller may not combine a cash discount with a convenience fee. For example, a seller may not charge a $0.50 convenience fee for all forms of payment with a $0.25 discount for paying by cash, check, or debit cards. In reality, this practice results in a non-uniform increase from the regular price ($0.50 for credit cards and $0.25 for cash, check, or debit card), and is therefore a prohibited credit card surcharge.

4. Option to pay by credit card with no fee

A seller may offer more than one method of paying by credit card, where at least one of the methods does not result in a fee. For example, a seller could offer an in-person option to pay by credit card without a fee, and an option to pay online by credit card with a fee. In this case, the fee is not a surcharge for paying by credit card, because there is a way to pay by credit card without incurring the fee.

5. Third-party payment processor

Sellers may contract with a third-party payment processor to accept payments by credit card. The processor may charge a fee that is higher for credit cards if the following three conditions are met.

First, the seller may not receive any portion of the fee charged by the processor, or any direct or indirect benefit from the fee (e.g., a discount on other services from the processor). If a processor imposes a greater fee for credit cards than for other forms of payment, and the seller receives a portion of this fee, then the seller is effectively imposing a credit card surcharge on the buyer.

Second, there must be an arm's-length relationship between the seller and the processor, limited to processing payments. If the processor has a continuing business relationship with the seller, then the relationship should be limited to the processing of payments. If the relationship goes beyond the processing of payments, or if the parties have a general-agency or joint-venture relationship, then the seller would effectively be imposing a credit card surcharge.

Third, multiple payment channels must be available to the buyer. The buyer must not be required to pay the processor's fee. If the seller requires the buyer to make payments through the processor and the processor requires the buyer to pay a greater fee for credit cards than for other forms of payment, then the seller is requiring the buyer to pay a credit card surcharge.