



COMMONWEALTH of VIRGINIA

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October 20, 2008

Ms. Karen A. Gould
Executive Director and Chief Operating Officer
Virginia State Bar
707 East Main Street
Richmond, Virginia 23219-2800

Dear Ms. Gould:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issues Presented

You ask whether state and federal law permit the Virginia State Bar and attorneys in private practice (“private attorneys”) to pass through to their attorney-licensees or clients, respectively, the merchant transaction fees imposed by credit card issuers. If state and federal law permit the pass through of merchant transaction fees in either or both cases, you ask whether there are any legal requirements governing this practice.

Response

It is my opinion that state and federal law do not prohibit the Virginia State Bar or private attorneys from passing through to their attorney-licensees or clients, respectively, the merchant transaction fees imposed by a credit card issuer.¹ It further is my opinion that state law expressly authorizes the Virginia State Bar to impose a surcharge on attorney-licensee’s payment obligation, provided the costs saved by acceptance of credit cards do not exceed the amount of surcharges collected. Finally, under federal law, it is my opinion that when credit card merchant transaction fees are passed through to attorney-licensees or clients, the transaction fees must be disclosed before such parties become obligated on the transaction when the transaction fees fall within the definition of a “finance charge.”

Applicable Law and Discussion

I find no applicable federal law prohibiting the practice of passing through credit card merchant transaction fees to persons who elect to pay with credit card instead of other forms of payment.²

¹While this opinion is not intended to address private agreements that may exist between a credit card issuer and the Virginia State Bar or private attorneys, I note that federal law prohibits credit card issuers from contractually barring sellers from offering cash discounts to consumers to encourage payment with cash instead of credit card. *See* 15 U.S.C.A. § 1666f(a) (West 1998).

²The practice of imposing a surcharge on individuals who paid with a credit card formerly was banned under federal law until February 27, 1984. *See* 15 U.S.C.A. § 1666f(a)(2) annot. (West 1998) (“Effective and Termination Notes”).

Likewise, I am not aware of any provision in the *Virginia Code* that prohibits such practice.³

In addition, § 2.2-614.1 provides that:

A. Subject to § 19.2-353.3, any public body that is responsible for revenue collection, including, but not limited to taxes, interest, penalties, fees, fines or other charges, may accept payment of any amount due by any commercially acceptable means, including, but not limited to, checks, credit cards, debit cards, and electronic funds transfers.

B. The public body may add to any amount due a sum, not to exceed the amount charged to that public body for acceptance of any payment by a means that incurs a charge to that public body or the amount negotiated and agreed to in a contract with that public body, whichever is less. Any state agency imposing such additional charges shall waive them when the use of these means of payment reduces processing costs and losses due to bad checks or other receivable costs by an amount equal to or greater than the amount of such additional charges.

While § 2.2-614.1 does not define the term “public body,” it is well-settled that “[t]he Code of Virginia constitutes a single body of law, and other sections can be looked to where the same phraseology is employed.”⁴ Section 2.2-3701 of the Virginia Freedom of Information Act in Title 2.2 defines a “public body” as “any legislative body, authority, board, bureau, commission, district or agency of the Commonwealth.” The Virginia State Bar is an administrative agency of the Supreme Court of Virginia;⁵ therefore, it is a “public body” within the meaning of § 2.2-614.1. The Bar is responsible for revenue collection, *e.g.*, mandatory annual fees.⁶ Thus, it is my opinion that § 2.2-614.1, subject to the limitations therein, expressly authorizes the Bar to pass through credit card merchant transaction fees to its attorney-licensees in the form of a surcharge.

When private attorneys or the Virginia State Bar passes through credit card merchant transaction fees to clients or attorney-licensees, federal law may impose disclosure requirements. Regulation Z⁷ of the federal Truth in Lending Act⁸ (“Regulation Z”) defines a “finance charge” as “the cost of consumer credit as a dollar amount,” including “any charge payable directly or indirectly by the consumer and imposed directly or indirectly by the creditor as an incident to or a condition of the extension of credit.”⁹

³The Truth in Lending Act only preempts state law to the extent that state law is inconsistent with federal law. *See* 15 U.S.C.A. § 1610(a)(1) (West 1998); 12 C.F.R. § 226.28(a)(1) (2008). Consequently, some states have passed laws that prohibit the imposition of a surcharge on a credit card holder who elects to use a credit card instead of other forms of payment. *See e.g.*, CAL. CIV. CODE § 1748.1(a) (Deering 2007).

⁴*King v. Commonwealth*, 2 Va. App. 708, 710, 347 S.E.2d 530, 531 (1986).

⁵*See* VA. CODE ANN. § 54.1-3910 (2005).

⁶*See* § 54.1-3912 (2005) (permitting Supreme Court to promulgate rules and regulations governing collection of fees paid by members of Virginia State Bar); *see also* VA. SUP. CT. R. pt. 6, § IV, para. 11 (requiring members of Virginia State Bar to pay annual dues to Bar’s treasurer).

⁷*See* 12 C.F.R. pt. 226 (Truth in Lending (Regulation Z)) (2008).

⁸*See* 15 U.S.C.A. § 1604(a) (West 1998) (directing Board of Governors of the Federal Reserve System to promulgate regulations governing Truth in Lending Act).

⁹12 C.F.R. § 226.4(a) (2008).

Additionally, Regulation Z defines “creditor” to mean, in part, “a person that honors a credit card.”¹⁰

Regulation Z also provides that “[a]ny person, other than the card issuer, who imposes a finance charge at the time of honoring a consumer’s credit card, shall disclose the amount of that finance charge prior to its imposition.”¹¹ In expanding upon this requirement, the staff of the Federal Reserve Board has commented that:

A person imposing a finance charge at the time of honoring a consumer’s credit card must disclose the amount of the charge, or an explanation of how the charge will be determined, prior to its imposition. This must be disclosed before the consumer becomes obligated for property or services that may be paid for by use of a credit card. For example, disclosure must be given before the consumer has dinner at a restaurant, stays overnight at a hotel, or makes a deposit guaranteeing the purchase of property or services.^[12]

Whether the disclosure requirement in Regulation Z¹³ is imposed upon the Virginia State Bar or private attorneys necessarily depends on how the merchant transaction fees are passed through to the attorney-licensee or client. It is clear that transaction fees passed through in the form of a surcharge added to the attorney-licensee or client’s total payment obligation would qualify as a “finance charge” under Regulation Z,¹⁴ which would trigger the disclosure requirements of Regulation Z.¹⁵ When the merchant transaction fee is passed on by offering a discount from the regular price to individuals paying with cash, the fee also constitutes a “finance charge,”¹⁶ unless the discount clearly and conspicuously is disclosed and offered to all attorney-licensees or clients.¹⁷ Thus, in transactions where the fee falls within the definition of a “finance charge,” Regulation Z requires that the amount of the merchant transaction fee assessed, or an explanation of how it will be calculated, be disclosed before the party is obligated on the transaction.¹⁸

Additionally, I note that, under specific circumstances, state law places requirements on the passing through of merchant transaction fees to individuals paying with credit cards. Section

¹⁰ *Id.* § 226.2(a)(17)(ii) (2008).

¹¹ *Id.* § 226.9(d)(1) (2008).

¹² *Id.* pt. 226, supp. I, § 226.9, annot. (2008) (comment 9(d)(1), “Official Staff Interpretations”).

¹³ *Id.* § 226.9(d)(1).

¹⁴ *See id.* § 226.4(a) (defining “finance charge”).

¹⁵ *See id.* § 226.9(d)(1); *see also id.* § 226.4(b)(2) (2008) (including “transaction charges” as express example of “finance charge”).

¹⁶ *See id.* § 226.4(b)(9) (2008) (naming “[d]iscounts for the purpose of inducing payment by a means other than the use of credit” as express example of “finance charge”).

¹⁷ *See* 15 U.S.C.A. § 1666f(b) (West 1998); 12 C.F.R. § 226.4(c)(8) (2008). Accordingly, if the discount is “clearly and conspicuously” disclosed and made available to “all prospective buyers,” there is no “finance charge.” 15 U.S.C.A. § 1666f(b).

¹⁸ Regulation Z does not require that this disclosure be made in writing; therefore, it may be provided orally. *See* 12 C.F.R. § 226.5 n.7 (2008). It also is worth noting that civil and criminal penalties for violations of the Truth in Lending Act may not be imposed on state agencies. 15 U.S.C.A. § 1612(b) (West 1998).

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2.2-614.1(B) requires that any surcharges assessed or imposed by a “state agency” must be waived if the acceptance of payment by credit card reduces other costs (*e.g.*, bad check processing costs) by an amount at least equal to the amount of surcharges collected. However, I find no other requirements under Virginia law that govern this practice.¹⁹

Conclusion

Accordingly, it is my opinion that state and federal law do not prohibit the Virginia State Bar or private attorneys from passing through to their attorney-licensees or clients, respectively, the merchant transaction fees imposed by a credit card issuer.²⁰ It further is my opinion that state law expressly authorizes the Virginia State Bar to impose a surcharge on attorney-licensee’s payment obligation, provided the costs saved by acceptance of credit cards do not exceed the amount of surcharges collected. Finally, under federal law, it is my opinion that when credit card merchant transaction fees are passed through to attorney-licensees or clients, the transaction fees must be disclosed before such parties become obligated on the transaction when the transaction fees fall within the definition of a “finance charge.”

Thank you for letting me be of service to you.

Sincerely,



Robert F. McDonnell

2:1367; 1:941/08-060

¹⁹I note that the Virginia Consumer Protection Act expressly does not apply to “[t]hose aspects of a consumer transaction which are regulated by the Federal Consumer Credit Protection Act, 15 U.S.C. § 1601 et seq.” Section 59.1-199(C) (2006). For background purposes, the Truth in Lending Act was enacted as Title I of the federal Consumer Credit Protection Act. *See* Pub. L. No. 90-321, § 101, 82 Stat. 147 (1968).

²⁰*See supra* note 1.