

The Commonwealth of Massachusetts

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DAVID J. COTNEY
COMMISSIONER OF BANKS

December 6, 2011

Mr. David Sands
President
New England Collectors Association
Two Wells Avenue
Newton, MA 02459

Dear Mr. Sands:

This letter is in response to your correspondence dated May 10, 2011 to the Division of Banks (the "Division") in which you request an opinion relative to certain issues on behalf of the members of the New England Collectors Association ("NECA"). You have also discussed these matters with staff of the Division.

The first issue raised in your letter is the payment of a convenience fee to a third party service provider to pay a delinquent debt. You reference the Division's Opinion No. O08041 relative to a private school system in Worcester in which the Division determined that a convenience fee paid to a third party service provider to process tuition payments made by credit card via the telephone or internet did not constitute a "surcharge" imposed by the seller in violation of Massachusetts General Laws chapter 140D, section 28A ("Section 28A"). The Division clearly stated that such opinion would be negated in its entirety if either the Diocese or any of its employees received any direct or indirect compensation of any kind from the third-party service provider or any affiliate, subsidiary or related party.

NECA's position is that the Division's opinion relative to convenience fees paid to third party service providers for the collection or processing of certain payments for tuition should be extended to include payments for delinquent debts made to a third party service provider on behalf of a licensed debt collector. You request the Division to issue an opinion to confirm NECA's position relative to convenience fees paid by a consumer on this set of facts.

The Division has reviewed said section 28A of chapter 140D relative to your request as well as Massachusetts General Laws chapter 93, sections 24-28, inclusive, and regulation 209 CMR 18.00 *et seq.*, which govern debt collectors licensed by the Division. As you are aware, debt collectors are required to be licensed by the Division and are subject to examination and other regulatory restrictions by law and regulation. A "debt collector" is defined as any person who uses an instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of debt, or who

regularly collects or attempts to collect, directly or indirectly, a debt owed or due or asserted to be owed or due another. Although your submission does not provide a full fact pattern it does recite the principal factors which were at the core of the position stated in Opinion O08041. Those principal factors in Opinion O08041 which are applicable here are:

- The consumer chooses to pay through a third-party service provider;
- Any additional costs including the convenience fee are associated with processing the payment by the third-party service provider and are paid directly to the third-party service provider;
- The third-party service provider is a completely independent company with no other relationship with the debt collector;
- The debt collector or any of its employees cannot receive any direct or indirect compensation of any kind whatsoever or consideration in any form from the third-party service provider or any other party; and
- The debt collector or any of its employees cannot have any relationship with the third-party service provider or any affiliate, subsidiary or related party thereof.

Accordingly, if a debt collector offered a debtor an option in accordance with the factors set forth above to make payments on the debt at the debtor's option through a third party service provider who charged a service fee to the debtor, that fee would not be a surcharge in violation of said Section 28A and would be permissible under 209 CMR 18.00 et seq.

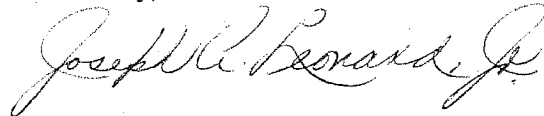
The second issue raised in your letter is whether the prohibition on a licensed debt collector soliciting postdated checks from a debtor would also prohibit a debt collector from negotiating a series of automatic debit transactions that will electronically deduct an agreed upon amount from the debtor's checking account at mutually agreed upon recurring dates. The Division has reviewed 209 CMR 18.17 relative to unfair practices by licensed debt collectors. Section 18.17(3) states that a debt collector may not request or demand from a consumer a postdated check, draft, order of withdrawal or "similar instrument" in payment of a debt and 18.17(4) prohibits a debt collector from depositing or threatening to deposit any postdated check or postdated payment instrument. These two subsections do not prohibit the exchange of post-dated checks between a debtor and a debt collector. They do, however, clearly prohibit the misuse of such items by the debt collector either by the demand of them or the subsequent threatening to prematurely deposit such items. Similarly, the Division would not view the applicable statutes or regulations to preclude the use of a mutually agreed to automatic debit payment plan that was not requested or demanded or misused by a debt collector. In the Commonwealth such pre-authorized payments are authorized by the provisions of section 10 of chapter 167B of the Massachusetts General Laws, which governs electronic funds transfers. Within those provisions of section 10 are several consumer protection measures, including that such preauthorized electronic fund transfers must be authorized in writing by the consumer. Some of the consumer protections in said section 10, would, in part, negate concerns that exist in the use of post-dated checks. Accordingly, it is the position of the Division that section 18.17 does not prohibit a debt collector from entering into a payment agreement with a debtor which electronically deducts an agreed to amount from a debtor's account at mutually agreed upon recurring dates.

Mr. David Sands
December 6, 2011
Page 3

The final issue raised in your letter is relative to the net worth requirements for licensed debt collectors found in 209 CMR 18.02. The Division is presently reviewing the net worth requirements for certain licensees and it will take NECA's comments on net worth under consideration when proposing any changes to the definition of "net worth" and other requirements as set out in 209 CMR 18.00 et seq. Any amendments to the regulation would be subject to prior notice as well as a public hearing and open comment period. The Division will keep you informed of developments in this process.

The conclusions reached in this letter are based solely on the facts presented. Fact patterns which vary from that presented may result in a different position statement by the Division.

Sincerely,

A handwritten signature in cursive script, reading "Joseph A. Leonard, Jr.", written in dark ink.

Joseph A. Leonard, Jr.
Deputy Commissioner of Banks
and General Counsel

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