



COMMONWEALTH OF MASSACHUSETTS

Office of Consumer Affairs and Business Regulation

DIVISION OF BANKS

1000 Washington Street, 10TH Floor, Boston, MA 02118-6200

(617) 956-1500 · Fax (617) 956-1599 · TDD (617) 956-1577

www.Mass.Gov/DOB

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TERENCE A. MCGINNIS
COMMISSIONER

October 24, 2017

Thomas P. Brown, Esq.
Paul Hastings LLP
101 California Street, 48th Floor
San Francisco, CA 94111

Dear Mr. Brown:

This letter is in response to your correspondence dated October 17, 2017 submitted on behalf of your client requesting an opinion from the Division of Banks (“Division”) as to whether G. L. c. 140D, § 28A prohibits the inclusion of a supplemental service charge for the ability to electronically pay insurance premium payments with a credit card.

Massachusetts General Laws chapter 140D, section 28A(2) provides that “[n]o seller in any sales transaction may impose a surcharge on a cardholder who elects to use a credit card in lieu of payment by cash, check or similar means.” As you may be aware, the same prohibition appears in the laws of several states. Notably, the United States Supreme Court recently had occasion to consider the question of whether the pertinent restriction – in this case, appearing in the law of the state of New York – violated the First Amendment to the United States Constitution.¹ *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144 (2017). In *Expressions*, the Supreme Court held that the same prohibition language does, in fact, regulate speech because it regulates how sellers may communicate their prices. As such, the Court remanded the case to the United States Court of Appeals for the Second Circuit to determine whether the prohibition language survives First Amendment scrutiny. In light of the foregoing Constitutional implications, the Division is not, at this time, inclined to opine on the interpretation of G. L. c. 140D, § 28A(2). Upon resolution of the outstanding Constitutional issues, the Division would be happy to review a further opinion request on behalf of your client, should it remain necessary.

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,

Merrily S. Gerrish
Deputy Commissioner of Banks
and General Counsel

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¹ N.Y. Gen. Bus. Law § 518 provides that “[n]o seller in any sales transaction may impose a surcharge on a holder who elects to use a credit card in lieu of payment by cash, check, or similar means.”