

**COMMONWEALTH OF MASSACHUSETTS**

**Office of Consumer Affairs and Business Regulation**

**DIVISION OF BANKS**

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January 3, 2020

Christopher Dagesse  
Vice President  
DCD Automotive Holdings, Inc.  
128 Carnegie Row, Suite 200  
Norwood, MA 02062

Dear Mr. Dagesse:

This letter is in response to your correspondence on behalf of DCD Automotive Holdings, Inc. (DCD) dated October 25, 2019 and received by the Division of Banks (Division) on November 5, 2019. Your correspondence requests an opinion relative to whether a fee for the processing of DCD customer credit card payments, charged and collected by a third-party payment processor engaged by DCD, is permissible under G. L. c. 140D, § 28A.

As described in your letter, DCD is in the business of selling and servicing new and used automotive vehicles, providing related services, and engaging in the sale of parts, accessories, extended service contracts, and related finance and insurance products. DCD has identified an independent third-party service provider to act as the processor (Processor) of credit card payments made by customers for goods and services purchased from DCD. As stated in your correspondence, DCD will contract with the Processor in order to offer its customers the option of paying by credit card. The processing fee will be a percentage of the payment amount. Notably, the processing fee will be paid directly to the Processor through the use of Processor's credit card equipment that will be provided to DCD. DCD would not charge a processing fee if the customer elected to pay by cash or check. In addition, you have noted that the customer will be informed in advance of what the processing fee will be if the customer elects to pay by credit card, and that the fee will not be charged if the customer chooses the cash or check payment option. As further described in your correspondence, the Processor is a completely independent company with no other business relationship to DCD. The processing fee to be charged will be based upon the costs associated with processing the customer's payments made by credit card. Your letter confirms that neither DCD nor any of its employees, affiliates, or subsidiaries would receive any direct or indirect compensation of any type whatsoever from the Processor, nor would they receive any consideration in any form from the Processor. Likewise, neither DCD nor any of its employees or affiliates have any relationship with the Processor other than the contractual relationship entered into for payment processing services, as described in your correspondence. As noted, the consumer will have the choice to pay by cash, check, or credit card. Payment by credit card would be strictly voluntary.

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 noted in your request, the Division has considered similar fact patterns involving the permissibility of merchants engaging third-party service providers to process customer credit card payments for a fee. *See* Opinions 08-041 and 11-017. In those opinions, the Division set forth principal criteria that it evaluates in such requests. These criteria are:

- That the consumer has the choice as to whether to pay by credit card through the third-party service provider;
- That any additional costs, including the convenience fee, that are associated with processing the credit card payment by the third-party service provider are paid directly to the third-party service provider;
- That the third-party service provider is a completely independent company with no other relationship to the merchant;
- That neither the merchant nor any of its employees may receive any direct or indirect compensation or consideration – in any form – from the third-party service provider or any other party; and
- That neither the merchant nor its employees have any relationship with the third-party service provider or any affiliate, subsidiary, or related party.

As expressly set forth in your request, DCD’s arrangement with the Processor will satisfy the above-referenced criteria. Accordingly, if DCD utilizes the Processor’s services as described in its correspondence and in accordance with the above-referenced criteria, it is the position of the Division that the processing fee is not in violation of G. L. c. 140D, § 28A.

As a separate and additional matter, the Division notes the ongoing question of the constitutionality of credit card surcharge provisions such as the one set forth in G. L. c. 140D, § 28A. These credit card surcharge provisions appear in the laws of several states. As discussed in the Division’s 2017 Opinion 17-008, the United States Supreme Court considered 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.<sup>1</sup> *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. Since that time, the United States Court of Appeals for the Second Circuit certified the question of this provision’s meaning to New York’s highest state court. *Expressions Hair Design v. Schneiderman*, 877 F.3d 99 (2d Cir. 2017). New York’s highest court, the Court of Appeals, held that a merchant posting the price of an item complies with New York’s credit card surcharge provision if and only if the merchant posts the total dollars-and-cents price charged to credit card users, thereby permitting surcharges if communicated to customers as required. *Expressions Hair Design v. Schneiderman*, 32 N.Y.3d 382 (2018). Subsequent to that determination, the parties settled the matter on terms that permit merchants in New York to impose credit card surcharges where the merchants post total prices for credit card purchases in dollars and cents. Furthermore, the credit card surcharge prohibitions of California, Texas, and Florida have recently been invalidated by federal courts on the same First Amendment grounds. *See Italian Colors Rest.*

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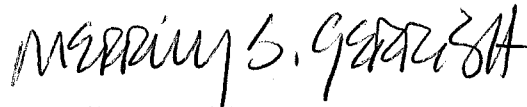
<sup>1</sup> N.Y. Gen. Bus. Law § 518 provides that “[n]o seller in any sales transaction may impose a surcharge on a holder who elects to use a credit card in lieu of payment by cash, check, or similar means.”

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*v. Becerra*, 878 F. 3d 1165 (9th Cir. 2018); *Rowell v. Paxton*, 336 F. Supp. 3d 724 (W. D. Tex. 2018); *Dana's R.R. Supply v. Attorney General of the State of Florida*, 807 F. 3d 1235 (11th Cir. 2015). Likewise, Oklahoma's Attorney General has recently opined that the state's credit card surcharge prohibition would violate the First Amendment if interpreted according to its plain meaning. *See Okla. Att'y Gen. Op. 12-2019* (Dec. 17, 2019). While not dispositive in the Division's analysis, the constitutional posture of such credit card surcharge provisions is worthy of noting. The Division recommends that DCD also consult with its counsel regarding the above-referenced constitutional considerations.

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 by the Division.

Sincerely,



Merrily S. Gerrish  
Deputy Commissioner of Banks  
and General Counsel

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