



COMMONWEALTH OF MASSACHUSETTS

Office of Consumer Affairs and Business Regulation

DIVISION OF BANKS

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April 12, 2022

Christina Demakopoulos, Esq.
Corporate Attorney
Hy Cite Enterprises, LLC
3252 Pleasant View Road
Middleton, WI 53562

Dear Ms. Demakopoulos:

This letter is in response to your June 18, 2021 correspondence to the Division of Banks (Division) on behalf of Hy Cite Enterprises, LLC (Hy Cite) requesting an opinion as to whether Hy Cite may properly charge convenience fees for telephone payments under Massachusetts M. G. L. c. 255D and M. G. L. c. 140D, § 28A.

Hy Cite is a licensed retail installment sales finance company pursuant to M. G. L. c. 255D, purchasing revolving retail installment sales agreements from a variety of independent distributors throughout the United States. As described in your correspondence, Hy Cite customers may make payments on these agreements by credit card or automatic bank transfer through Hy Cite's online payment portal. Hy Cite does not charge a convenience fee for payments made online. Likewise, customers may make payments on an agreement through the submission of a physical check, money order, or cashier's check to Hy Cite. Similarly, Hy Cite does not impose a convenience fee for payments made by physical check, money order, or cashier's check. Hy Cite also offers the option to make payments by telephone. With respect to payments that customers may seek to make over-the-phone, however, Hy Cite is seeking the opinion of the Division as to whether a \$10 convenience fee may properly be charged. These over-the-phone payments may be made by customers via credit or debit card or by check. Your letter sets forth several facts upon which Hy Cite relies for its position that the convenience fee is permissible. First, your letter notes that the convenience fee for the phone payment service is posted on the Hy Cite website. As also noted in your correspondence, the fee with respect to telephone payments is based upon the higher costs incurred by Hy Cite in processing of such payments. Specifically, your letter indicates that manual processing of such payments on an expedited basis requires utilizing extra Hy Cite employee time. According to Hy Cite, payment over the telephone results in higher costs incurred by Hy Cite, irrespective of whether such payment is made by credit card, debit card, or by check.

Massachusetts General Laws chapter 255D, section 11, governing the finance charge under a retail installment agreement, provides, in pertinent part:

A. No fee, expense or other charge whatsoever shall be taken, received, reserved or contracted for, except as provided in this section and in sections sixteen to twenty-two, inclusive, and except for official fees, and for the items expressly provided for in the retail installment sale agreement as set forth in section nine.

In addition, Massachusetts General Laws chapter 140D, section 28A(2) provides:

(2) No 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.

The Division has long recognized the restrictive nature of the language set forth in M. G. L. c. 255D, § 11, paragraph A. The statute does not expressly authorize convenience fees. At the same time, the Division has also considered the increased availability of electronic payment and alternative payment methods, options which were not available to borrowers at the time of the passage or any amendments to M. G. L. c. 255D and therefore not contemplated. As such, the Division has looked to the analysis it employs in the context of M. G. L. c. 140D, § 28A, governing credit card surcharges, as an appropriate approach to its review of convenience fees under M. G. L. c. 255D. More specifically, under M. G. L. c. 140D, § 28A, the Division has determined that a convenience fee for the use of a credit card is permissible when the following five criteria are satisfied:

- The consumer has the choice as to whether to pay by credit card through the third-party service provider;
- Any additional costs, including the convenience fee, that are associated with processing the credit card payment by the third-party service provider are paid to the third-party service provider;
- The third-party service provider is a completely independent company with no other relationship to the merchant;
- 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
- Neither the merchant nor its employees have any relationship with the third-party service provider or any affiliate, subsidiary, or related party.

See Division Opinions 19-010, 13-014, 13-010, 08-041. In determining when a credit card processing fee is permissible, a critical aspect of the Division's review is whether the merchant is utilizing a third party for processing the payment and that the amount of the processing fee (or convenience fee) charged to the consumer is equal to the actual cost that the third-party service provider charges the merchant for the processing of the credit card payment – i.e. the processing fee that the consumer pays is simply a pass-through fee from the third-party service provider.

While in a different context, federal courts have considered whether such a pass-through convenience fee is permissible under the Federal Fair Debt Collection Practices Act (FDCPA), which prohibits the collection of any amount (including any interest, fee, charge, or expense) unless such amount is expressly authorized by the agreement creating the debt or permitted by law.¹ The Division notes that the

¹ The pertinent provision of the FDCPA, 15 U.S.C. § 1692f, provides, in relevant part:

cited provision of the FDCPA contains restrictive language somewhat similar in its breadth to the language set forth in M. G. L. c. 255D, § 11 with respect to the charging or collecting of other fees. Notably, in analyzing the pertinent language of the FDCPA, several courts have concluded that true pass-through fees do not constitute the collection of an impermissible extra fee because the debt collector was not collecting or otherwise receiving any additional compensation resulting from the pass-through processing fee. *See Shami v. National Enterprise Systems*, 2010 U.S. Dist. LEXIS 99838, *7-8 (E.D.N.Y. Sept. 23, 2010) (concluding that telephone convenience fee retained by debt collector that was not merely a third-party pass-through fee would violate 15 U.S.C. §1692f); *Lee v. Main Accounts, Inc.*, 1997 U.S. App. LEXIS 27922 (6th Cir. 1997) (unpublished opinion) (five percent fee mentioned in letter was not a “creditor’s fee”, but a third-party charge triggered when the debtor chose the option of paying by credit card); *Alexander v. Account Discovery Sys., LLC*, 2018 U.S. Dist. LEXIS 223167, *11 (N.D. Ga. Nov. 1, 2018); *Acosta v. Credit Bureau of Napa Cnty.*, Case No. 14-C-8198, 2015 U.S. Dist. LEXIS 55870, *6-8 (N.D. Ill. Apr. 29, 2015); *Lewis v. ACB Bus. Servs., Inc.*, 911 F. Supp. 290, 293 (S.D. Ohio 1996). While the Division recognizes that these cases analyze the permissibility of convenience fees in the context of debt collection, the underlying principle is analogous; specifically, where the processing fee or convenience fee is merely a pass-through fee because the debt collector (or licensee or merchant, as applicable) does not receive any compensation from the fee, such a fee is not actually being collected for purposes of the FDCPA or “taken, received, reserved, or contracted for” within the meaning of M. G. L. c. 255D. The Division also acknowledges, however, that this area of the law is not settled. *See Mann v. Nat’l Ass’n Mgmt. Enters., Inc.*, 2005 U.S. Dist. LEXIS 49552 (C.D. Ill. Feb. 23, 2005); *Flores v. Collection Consultants of California*, 2015 U.S. Dist. LEXIS 92732 (C.D. Cal. Mar. 20, 2015). While recognizing the differing conclusions reached in the FDCPA context, the Division nonetheless has determined that the analysis and conclusions set forth in those cases permitting pass-through processing fees are persuasive. In addition, this conclusion is also consistent with the Division’s longstanding position regarding the permissibility of third-party payment processing fees for debtors making payments to debt collectors via credit card under the Commonwealth’s Fair Debt Collection Practices Act, M. G. L. c. 93, § 24 *et seq.* *See* Division Opinion 11-017.

As such, it remains the position of the Division that “convenience fees” or “processing fees” for consumer payments may only be charged under M. G. L. c. 255D if the fee is administered in accordance with the following criteria:

- The licensee utilizes a third-party payment processor for the processing of the payment;
- The consumer has the choice as to whether to make the payment through the third-party service provider and must be able to avoid the convenience fee or processing fee by making the payment to the licensee by another method;

A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law.

- Any additional costs, including the processing fee or convenience fee, that are associated with processing the payment by the third-party service provider are paid to or passed through to the third-party service provider;
- The third-party servicer provider is a completely independent company with no other relationship to the licensee;
- Neither the licensee nor any of its employees or affiliates may receive any direct or indirect compensation or consideration – in any form – from the third-party service provider or any other party;
- Neither the licensee nor its employees have any relationship with the third-party servicer provider or any affiliate, subsidiary, or related party; and
- The amount of any fee would need to be clearly disclosed to the consumer prior to the consumer's selection of the payment method and before any such fee is charged. For consumers making a payment by telephone, the licensee must ensure that the fee is disclosed verbally over the phone prior to the consumer being charged. Likewise, for consumers making payments via a website, the fee must be clearly disclosed to the consumer electronically as part of the payment process.

Reviewing Hy Cite's telephone payment fee, as described in your correspondence, the Division notes, in particular, that the fee charged to consumers for their telephone payment is made to Hy Cite directly and retained by Hy Cite. It is not a processing fee imposed by a third-party payment processor that is merely passed through to the consumer. Accordingly, it is the conclusion of the Division that Hy Cite's \$10 convenience fee for telephone payments, as described in your letter, is not permissible under M. G. L. c. 255D.

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

Sincerely,

/s/ Barbara Keefe
Deputy Commissioner of Banks
and General Counsel